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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEIL HARTIGAN
~~TYRONE C. FAHNER~~, ATTORNEY GENERAL OF ILLINOIS, CHARLES P. ZALAR, STATE'S ATTORNEY OF GRUNDY COUNTY, and PHILIP GUSTAFSON, DIRECTOR OF THE ILLINOIS DEPARTMENT OF NUCLEAR SAFETY,

Petitioners,

v.

GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the Illinois Spent Fuel Act, Ill. Rev. Stat. ch. 111½, §§ 230.21-.24, which was enacted to protect Illinois from the adverse economic consequences resulting from the absence of a national policy concerning nuclear waste disposal, authorized under section 274(k) of the Atomic Energy Act, 42 U. S. C. § 2021(k), and, if it is not, does the Atomic Energy Act violate the Tenth Amendment by interfering impermissibly with the right of Illinois to exercise control over its treasury?
2. Is the Illinois Spent Fuel Act, Ill. Rev. Stat. ch. 111½, §§ 230.21-.24, a valid exercise of state power under the Commerce Clause to prohibit the importation into Illinois of spent nuclear fuel, an inherently dangerous material?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit was entered on July 13, 1982 and is reported below as *Illinois* v. *General Electric Company*, 683 F. 2d 206 (7th Cir. 1982). The opinion of the District Court for the Northern District of Illinois is not officially reported.

Jurisdiction

This petition for certiorari is sought under 28 U. S. C. § 1254(1). The petition was filed within ninety days after the entry of judgment in the Court of Appeals on July 13, 1982, in conformity with Rule 20.2 of this Court.

Constitutional and Statutory Provisions Involved

This case involves the following constitutional and statutory provisions, the relevant portions of which are set forth in the Appendix:

United States Constitution, Amendment X;

United States Constitution, Article I, Section 8 (Commerce Clause);

United States Constitution, Article VI (Supremacy Clause);

Atomic Energy Act of 1954, as amended, 42 U. S. C. §§ 2011-2296 (Supp. IV 1980);

Spent Fuel Act, Ill. Rev. Stat. ch. 111½, §§ 230.21-.24 (1981).

STATEMENT

The issue presented in this case—state regulation of high level nuclear waste—is not likely to disappear. It will recur before this Court again and again. The nuclear power industry has grown rapidly and is now at a point where it constitutes a major source of energy for the Nation. This growth has produced a serious and alarming problem—the need to provide for the safe and secure disposal of spent nuclear fuel.

Irradiated nuclear fuel assemblies, which are the fuel source of nuclear power plants, eventually lose their ability to sustain a chain reaction sufficient to generate nuclear power. "Spent" fuel assemblies must be periodically removed from nuclear reactors and replaced with fresh fuel. When removed, spent fuel assemblies generate enormous amounts of heat and contain highly radioactive materials. Because of its high radioactivity, spent fuel, unlike ordinary garbage or other forms of hazardous waste, cannot be readily disposed of by burial in land or in the ocean, since it would release levels of radiation sufficient to kill all plant, animal, and oceanic life. Moreover, the radioactivity of spent fuel is extremely long-lived, and thousands of years must pass before the fuel can be safely released into the environment.

At present, there is no permanent method of disposing of spent fuel.[1] For the interim, most spent fuel is stored on-site at nuclear power plants throughout the Nation. The remaining spent fuel is stored away-from-reactor at a facility ("the Morris Facility") operated by Respondent General Electric Company ("General Electric") in Morris, Illinois. The Morris Facility is

[1] At one time, it was hoped that spent fuel would be reprocessed to recover certain remaining materials, primarily plutonium, that could be recycled into the generation process. Because plutonium is the major component of nuclear weapons, the federal government has imposed a moratorium on reprocessing spent fuel to avoid the dangers of proliferation of plutonium. *See Minnesota* v. *Nuclear Regulatory Comm'n*, 602 F. 2d 412, 414 (D. C. Cir. 1979).

the only commercial away-from-reactor spent fuel storage site in the United States. The Morris Facility was originally intended to serve as a reprocessing plant—not as a storage or disposal site for spent fuel. Because of its design and limited capacity, the Morris Facility is, at best, a temporary expedient for, not a permanent solution to, the national problem of spent fuel disposal.

Recognizing the inadequacies of the Morris Facility and the need for a national solution to the problem of disposing of spent fuel, Illinois enacted the Spent Fuel Act. Ill Rev. Stat. ch. 111½, §§ 230.21-.24 (1981). The Spent Fuel Act provides that spent nuclear fuel generated outside Illinois may not be transported into or stored in Illinois unless the state of origin has an away-from-reactor storage site and has entered into a reciprocity agreement with Illinois.

Respondents General Electric, operator of the Morris Facility, and Southern California Edison, operator of a nuclear generating facility in California planning to ship spent fuel to the Morris Facility, brought an action in the United States District Court for the Northern District of Illinois, seeking a declaration that the Spent Fuel Act was unconstitutional and an order restraining its enforcement. On the same day, Petitioner Tyrone C. Fahner, the Attorney General of Illinois, filed an action in the Circuit Court of Grundy County, Illinois under the Spent Fuel Act, other Illinois statutes, and the common law, seeking to enjoin Southern California Edison from transporting spent fuel into Illinois and General Electric from storing that spent fuel in Illinois. Respondents subsequently removed the state court action to the District Court, where it was consolidated with the federal action. Petitioner Fahner thereafter moved that the state court action be remanded to the Circuit Court of Grundy County. The District Court denied this motion.

Respondents then moved for summary judgment in both cases. The District Court granted summary judgment, holding that the Spent Fuel Act was preempted by the Atomic Energy

Act, 42 U. S. C. §§ 2011-2296, and invalid under the Commerce Clause. Petitioners appealed, challenging the final judgments in both actions and also the District Court's refusal to remand the state court action to state court.

The Court of Appeals for the Seventh Circuit affirmed the grant of summary judgment in the federal action and reversed the District Court's refusal to remand the state court action to state court.[2] In affirming the grant of summary judgment, the Court of Appeals held that the Spent Fuel Act was preempted by the Atomic Energy Act, 42 U. S. C. §§ 2011-2296, and violated the Commerce Clause. The decision of the Court of Appeals not only conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 659 F. 2d 903 (9th Cir. 1981), *cert. granted in part*, 102 S. Ct. 2956 (1982), but also overlooks the Tenth Amendment right of the states to regulate the nuclear industry in the exercise of their traditional governmental functions.[3]

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[2] Petitioners do not ask this Court to review the Court of Appeals' decision to remand the state court action to state court, but seek review only of the decision of the Court of Appeals sustaining the District Court's grant of summary judgment on the federal constitutional issues.

[3] Because this Petition draws into question the constitutionality of the Atomic Energy Act, 28 U. S. C. § 2403(a) may be applicable. Neither the District Court nor the Court of Appeals has, pursuant to section 2403(a), certified to the United States Attorney General the fact that the constitutionality of the Atomic Energy Act is drawn into question in this case.

REASONS FOR GRANTING THE WRIT

I.

STATES ARE UNCERTAIN AS TO THE SCOPE OF THEIR AUTHORITY OVER HIGH LEVEL NUCLEAR WASTE, BECAUSE THIS COURT HAS NOT ADDRESSED THE EXTENT TO WHICH THE ATOMIC ENERGY ACT PREEMPTS STATE LEGISLATION CONCERNING SUCH WASTE OR THE UNCONSTITUTIONALITY OF THE ATOMIC ENERGY ACT INSOFAR AS IT IS INTERPRETED TO IMPAIR TRADITIONAL STATE GOVERNMENTAL FUNCTIONS.

The problem of nuclear waste disposal is nationally important and must be addressed. The Nation is heavily dependent upon nuclear power as a source of energy, and, thus, proper disposal of the waste produced by that source of energy is a matter that vitally affects all citizens of this Nation. The problem is not, however, a problem that one state should bear or solve merely because Congress has not acted to provide a national solution. No state wants to be nor should be, by default, a "dumping ground" for the rest of the Nation's nuclear waste. It is a national problem, requiring a national solution.

The federal government has not yet found a solution to the problem of spent fuel disposal. As the Court of Appeals acknowledged, the Atomic Energy Act ("AEA") does not mention spent fuel. Nowhere in the AEA is there a program or even an approach to deal with nuclear waste disposal. Although regulations of the Nuclear Regulatory Commission ("NRC") address the licensing of facilities for the temporary storage of high level waste, they contain no program or policy relating to permanent disposal of such wastes. The reason for this is that Congress has never been able to agree on such a policy or program. Despite repeated efforts in the last five years to enact legislation designed to deal with the problem of the

permanent disposal of nuclear waste, Congress has not yet adopted such legislation.[4]

Unless this Court reverses the Court of Appeals' interpretation of the AEA and the Commerce Clause as they relate to the permissible scope of state regulation of spent fuel transportation and storage, Illinois stands to be uniquely prejudiced by the lack of a national policy on nuclear waste disposal. If the Court of Appeals is correct, and Illinois cannot restrict out-of-state use of the Morris Facility until a permanent disposal solution is established at the national level, then a predictable course of events is likely to force Illinois to commit its resources and funds, in massive amounts and in perpetuity, to the care and maintenance of the Morris Facility.

If Illinois must allow utility companies throughout the entire Nation to transport their spent fuel to the Morris Facility rather than retaining it in at-the-reactor storage facilities until a permanent disposal facility is available, the capacity of the Morris Facility will be exhausted in the very near future. When that occurs, Respondent General Electric, the operator of the Morris Facility, will no longer have an economic incentive to maintain and manage the facility and, if history is a reliable indicator of the future, will likely abandon it.[5] Illinois will then

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[4] *See, e.g.*, S. 63, 95th Cong., 1st Sess., 123 CONG. REC. 447 (1977); H.R. 14323, 95th Cong., 2d Sess., 124 CONG. REC. 37,170 (1978); S. 594, 96th Cong., 1st Sess., 125 CONG. REC. 4416 (1979); S. 2189, 96th Cong., 2d Sess., *cited in* 1980 CONG. Q. ALMANAC 494-502; S. 95, 97th Cong., 1st Sess., 127 CONG. REC. S140-48 (daily ed. Jan. 15, 1981); S. 1662, 97th Cong., 2d Sess., 128 CONG. REC. S2851 (daily ed. Mar. 25, 1982).

[5] Abandonment of nuclear and other hazardous waste disposal sites by private operators is a common occurrence. A low-level nuclear waste site in Sheffield, Illinois was abandoned by its private operator in 1979, and litigation filed to protect the people of Illinois from the environmental and economic consequences is still far from resolved. New York and Kentucky have experienced similar problems at the West Valley and Maxey Flats disposal sites. Similar occurrences involving non-nuclear hazardous wastes have been recorded across the Nation.

be left with the difficult and expensive task of managing and maintaining the facility, a task that could very well bankrupt the State's treasury. Illinois will be forced to expend state funds to provide highly skilled around-the-clock technical, maintenance, and security personnel and to maintain a highly complex facility, containing extremely technical and expensive equipment. The cost of state government would rise dramatically and threaten the ability of Illinois to meet the needs of its residents.

To avoid the strain on the state budget and resources that abandonment would cause, Illinois has imposed reasonable restraints on the use of the Morris Facility to ensure that the storage space at that facility will not be exhausted before a permanent disposal site is available. Only in this way can Illinois assure that General Electric will have an economic interest in maintaining the site until a permanent disposal site is designated, and the spent fuel now stored at the Morris Facility and at nuclear reactors around the Nation can be transferred to that site.

The preemption issue in this case is, then, whether the AEA should be interpreted, as the Court of Appeals implicitly concluded, as a Congressional decision to foist upon one state, through national neglect, the entire burden of nuclear waste disposal or whether the AEA should be interpreted to allow individual states to take the steps necessary, pending the adoption of a national policy, to avoid the potentially devastating economic consequences of becoming a national dumping ground for high level nuclear waste. The decision of the Court of Appeals, sustaining the former interpretation, is not only inconsistent with the express language of the AEA, but also renders the AEA unconstitutional under the Tenth Amendment.

A.

The Illinois Spent Fuel Act Is Not Preempted by the Atomic Energy Act, Because Its Purpose Is Not to Regulate Radiation Hazards. The Decision of the Court of Appeals in This Case Is in Direct Conflict With the Decision of the Court of Appeals for the Ninth Circuit in the *Pacific Gas & Electric Co.* Case.

Contrary to the opinion of the Court of Appeals for the Seventh Circuit (App. 16a), Illinois can, and does, "quarrel" with that Court's analysis of the preemption issue presented in this case. The Court of Appeals concluded erroneously that the AEA's grant of authority to the NRC to license spent fuel storage facilities necessarily precludes Illinois from regulating the storage of spent fuel. In so holding, the Court of Appeals ignored Section 274(k) of the AEA, which specifically allows states to regulate nuclear power in some circumstances:

> Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

42 U. S. C. § 2021(k) (1976).

The intent of Congress in enacting section 274(k) was "to make it clear that the [AEA] does not impair the State authority to regulate activities of AEC licensees for the manifold health, safety, and economic purposes other than radiation protection." S. Rep. No. 870, 86th Cong., 1st Sess., *reprinted in* 1959 U. S. Code Cong. & Ad. News 2872, 2882. Indeed, several courts have so construed section 274(k) and have upheld state regulation of nuclear activities aimed at state purposes other than radiation hazards. *Illinois* v. *Kerr-McGee Chemical Corp.*, 677 F. 2d 571 (7th Cir. 1982); *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 659 F. 2d 903 (9th Cir. 1981), *cert. granted in part*, 102 S. Ct. 2956 (1982). *See also Northern States Power Co.* v. *Minnesota*, 447 F. 2d 1143, 1150 (8th Cir.

1971), *aff'd mem.*, 405 U. S. 1035 (1972) (state regulation of radiation hazards preempted, but section 274(k) held to allow regulation of matters other than radiation hazards).

The Court of Appeals ignored the express language of section 274(k) and the legislative history of the Spent Fuel Act. That legislative history reveals that the purpose of the Act was not to regulate radiation hazards, but to respond to Illinois' concern for its economic well-being in view of the lack of a federal policy to solve the nuclear waste disposal problem. Underlying that concern was the legislators' belief that the government and taxpayers of Illinois, the situs of the Nation's only commercial away-from-reactor nuclear storage facility, should not have to bear the present and potential economic burden of the entire Nation's nuclear waste, as a result of national neglect. That this concern is a legitimate State concern justifying state legislative response is supported by a recent decision of the Court of Appeals for the Ninth Circuit.

The Ninth Circuit in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 659 F. 2d 903 (9th Cir. 1981), *cert. granted in part*, 102 S. Ct. 2956 (1982), construed a California statute that imposed a moratorium on certification of all nuclear plants in California until the California Energy Commission determined that a federally-approved method of disposing of nuclear wastes existed. Upon examining the legislative history of the California statute, the Ninth Circuit found that the concern of the California legislators was the lack of a federally-approved method of disposing of nuclear waste. The legislators deemed this problem to be " 'largely economic or the result of poor planning, *not* safety related,' " and did not directly address the issue of waste disposal *safety*, but " 'ask[ed] only that a method [of waste disposal] be chosen and accepted by the federal government.' " 659 F. 2d at 924-25 (quoting California Assembly Committee on Resources, Land Use & Energy, *Reassessment of Nuclear Energy in California* 154-55) (emphasis in original). The Ninth Circuit held that the California

statute was aimed at purposes other than protection against radiation hazards and was, thus, not preempted by the AEA, but was expressly authorized under section 274(k).

Since the Illinois Spent Fuel Act was enacted for the same purpose as the California statute, under the Ninth Circuit's interpretation of the AEA, the Spent Fuel Act is not preempted by the AEA, but is expressly authorized by section 274(k) of that Act. The Seventh Circuit, however, held that the Spent Fuel Act is preempted by the AEA. There is, thus, a direct conflict between the Courts of Appeal on the issue presented in this case, a conflict that only this Court can resolve. This Court has granted *certiorari* in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission,* 102 S. Ct. 2956 (1982), and should also grant *certiorari* in this case.

B.

The Court of Appeals' Interpretation of the Atomic Energy Act Interferes Unconstitutionally With the Right of the State of Illinois to Control Its Treasury, a Traditional and Integral State Governmental Function.

The Court of Appeals' interpretation of the AEA renders the AEA unconstitutional under the Tenth Amendment.[6] The failure of Congress to enact a nuclear waste disposal policy, when combined with the Court of Appeals' interpretation that Congress intended the AEA to preempt the Spent Fuel Act, deprives Illinois of the right to protect its treasury from reasonably predictable catastrophic obligations. In enacting the Spent Fuel Act, Illinois sought only to stem the flow of spent fuel to the Morris Facility so as to reduce the risk of early abandonment or other problems at that facility that could have immediate adverse effects on the financial well-being of the state.

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[6] This Court need not, of course, reach the issue of the constitutionality of the AEA if it interprets the AEA consistently with the express language of section 274(k) of the AEA and finds that the Spent Fuel Act is not preempted.

The practical effect of the Court of Appeals' decision, coupled with Congress' failure to provide a permanent solution to the high level nuclear waste disposal problem, is that Congress has determined that high level nuclear waste disposal is a complex problem with no ready solution and has at the same time passed a law to prevent Illinois from taking action to control the dumping of such waste into Illinois for "temporary" storage in a facility never intended to be a permanent disposal site. The consequence of Congressional action—the AEA—and inaction—the the lack of a policy on nuclear waste disposal—is that the taxpayers and treasury of Illinois are held at ransom by a national problem. If Congress can force Illinois to mortgage its future and gamble its treasury on the hope that a national disposal policy will be established before problems develop at the Morris Facility and can preclude Illinois from prohibiting the national dumping of high level waste at the Morris Facility, then Illinois can no longer control its own treasury or its own destiny.

The Tenth Amendment was designed to prevent Congress from so totally eroding the sovereignty of a state. *See National League of Cities* v. *Usery*, 426 U. S. 833, 840-852 (1976); *District of Columbia* v. *Train*, 521 F. 2d 971, 994 (D. C. Cir. 1975), *vacated sub nom., EPA* v. *Brown*, 431 U. S. 99 (1977). More specifically, the Tenth Amendment prohibits Congress from "impair[ing] the States' integrity or their ability to function effectively in a federal system." *Fry* v. *United States*, 421 U. S. 542, 547 n. 7 (1975). As this Court said in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U. S. 264, 286-87 (1981) (quoting *National League of Cities*, 426 U. S. at 845:

> [W]hen Congress attempts to regulate the States as States the Tenth Amendment requires recognition that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."

The right of a state to protect its treasury has traditionally and historically been recognized as one of the essential elements of the state sovereignty. *National League of Cities,* 426 U. S. at 845-52. Without this power, a state would lack the ability to implement decisions, policies, and programs, and its decisionmaking power—"what gives the State its sovereign nature"—would be meaningless. *FERC* v. *Mississippi,* 102 S. Ct. 2126, 2138 (1982). Congress cannot, by its failure to enact nuclear waste disposal legislation and its preemption of the Spent Fuel Act, displace the power of Illinois to make decisions affecting its treasury. If it could, there would be "little left of [Illinois'] 'separate and independent existence.'" *National League of Cities,* 426 U. S. at 851 (quoting *Lane County* v. *Oregon,* 74 U. S. (7 Wall.) 71, 76 (1869). The Tenth Amendment does not sanction this result, and the Court of Appeals' interpretation of the AEA to reach this result renders the AEA unconstitutional.

II.

THE SPENT FUEL ACT IS A VALID EXERCISE OF STATE POWER UNDER THE QUARANTINE CASES TO PREVENT SPENT NUCLEAR FUEL, AN ENVIRONMENTALLY DANGEROUS ARTICLE, FROM CROSSING ILLINOIS BORDERS.

This Court has made it clear that the Commerce Clause permits a state to establish a quarantine against the importation of environmentally noxious and unsafe articles. *Clason* v. *Indiana,* 306 U. S. 439 (1939) (diseased animals); *Sligh* v. *Kirkwood,* 237 U. S. 52 (1915) (immature citrus fruit); *Asbell* v. *Kansas,* 209 U. S. 251 (1908) (diseased cattle); *Reid* v. *Colorado,* 187 U. S. 137 (1902) (diseased animals). Justice Matthews' opinion in *Bowman* v. *Chicago & Northwestern Ry. Co.,* 125 U. S. 465, 489 (1888), sets forth the quarantine doctrine accurately and completely:

> Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution.

The right to ban environmentally noxious articles is a "right founded . . . in the sacred law of self-defence." *Hannibal & St. Joseph R.R.* v. *Husen,* 95 U. S. 465, 471 (1877). Certainly, no one would contest Illinois' assertion that nuclear waste presents a grave hazard to its environment, not only in storage, but also in transport.

The Court of Appeals concluded erroneously that this case is governed, not by the quarantine cases, but by *City of Philadelphia* v. *New Jersey,* 437 U. S. 617 (1978). In that case, this Court struck down as violative of the Commerce Clause a New Jersey statute prohibiting out-of-state residents from using New Jersey landfill sites to dispose of ordinary garbage. This Court distinguished the New Jersey statute from the quarantine cases on the ground that New Jersey could not claim that there is danger in transporting garbage, because there is none. Ordinary garbage is not inherently dangerous, and its very movement does not pose any danger to the environment. Nothing about ordinary garbage suggests that the risks of transport are so high as to require storage or disposal to the point of origin as possible.

By contrast, the articles in the quarantine cases were inherently dangerous, and the very movement of those articles would have increased the risk of spreading disease, infection, and pestilence, principally because of the inability to contain the disease, germ, or infection in the event of an accidental release into the environment. For this reason, the quarantine cases sanctioned laws designed to encourage disposal of such articles near the point of origin and to discourage their movement in commerce.

These same considerations apply to spent nuclear fuel with even more force. Spent nuclear fuel is unquestionably inherently dangerous, and the very movement of such fuel poses a serious, uncontrollable environmental hazard. Accident, sabotage, or carelessness could easily result in the leakage of lethal and environmentally destructive radioactive material. Once released into the environment, radioactivity cannot be controlled or contained. For these reasons, spent fuel, like the quarantined articles, should be stored as close to the point of origin as possible until a national permanent disposal policy is adopted. The movement of spent fuel away from reactors, and the transportation, handling, and rehandling that that movement necessitates, should be discouraged until the fuel can be moved once and for all to a permanent disposal site. Spent fuel assemblies—even more so than diseased animals and infected rags—deserve no recognition as "legitimate subjects of trade and commerce." *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 489 (1888). Spent nuclear fuel, therefore, resembles the inherently dangerous quarantined articles, not ordinary garbage. The Court of Appeals' reliance on this Court's opinion in *City of Philadelphia* to reach a contrary conclusion is misplaced and incorrect.

In enacting the Spent Fuel Act, Illinois was concerned with the hazards of the transport and handling, as well as those of the storage, of spent fuel. The Spent Fuel Act does permit intrastate shipment, but so did the quarantine cases. Spent fuel, like the noxious articles in the quarantine cases, should be disposed of as close as possible to the point of generation to

avoid as much transportation as possible. Illinois is a major generator of spent fuel, and it is reasonable to expect Illinois to use all available Illinois resources to solve the problem of disposing of spent fuel. The allowance of intrastate shipments is not evidence of a lack of concern for the hazards of shipment, but is merely a recognition of the reality of the situation and evidence of a desire to accommodate, within that reality, the concern for disposing spent fuel as close as possible to the point of generation. The laws sustained in the quarantine cases were no different.

The principle to be drawn from the quarantine cases is that a state may deal with the problem of its own noxious environmental hazards as best it can, but need not be, and may not be forced to be, a dumping ground for the entire Nation. To deny Illinois the right to close its borders to the environmental hazards of spent fuel would simply permit other states and their utility companies to refuse to address the problem of such hazards by allowing them to follow the cheap and expedient route of dumping those hazards in Illinois. Such a result is surely not necessary to foster interstate commerce and could not have been what the Framers intended to encourage by adopting the Commerce Clause.

CONCLUSION

Petitioners respectfully request that, for the reasons heretofore adduced, this Court issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit and reverse the judgment below.

Respectfully submitted,

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Appendix 1

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-2768

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY,

Defendants-Appellees.

No. 81-2778

GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY,

Plaintiffs-Appellees,

v.

TYRONE C. FAHNER, Attorney General of Illinois, CHARLES ZALAR, State's Attorney of Grundy County, and PHILIP GUSTAFSON, Director of the Department of Nuclear Safety,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 81-C-0461, 80-C-6835—Frank J. McGarr, *Judge.*

ARGUED MAY 25, 1982—DECIDED JULY 13, 1982

Nos. 81-2768 & 81-2778

Before WOOD and POSNER, *Circuit Judges*, and FOREMAN, *Chief Judge*.*

POSNER, *Circuit Judge*. These consolidated appeals present questions of federal jurisdiction and constitutional law arising out of an attempt by the State of Illinois to prevent the shipment of spent nuclear fuel into the state for storage.

The fuel for nuclear electric-power reactors—enriched uranium—becomes depleted after a few years in the reactor and has to be replaced. Because the spent fuel is highly radioactive and its radioactivity very long-lived, the question what to do with it is a troublesome one. The spent fuel cannot just be thrown away, because wherever it is thrown will be contaminated. It used to be thought that the spent fuel would be reprocessed to make new fuel; but reprocessing of nuclear fuel has become intensely controversial and its prospects currently are uncertain. At the moment, then, spent nuclear fuel has to be stored indefinitely. But there is as yet no acceptable method of permanent, safe storage; and meanwhile the spent fuel is being stored for the most part in "swimming pools" at the reactor sites. However, some reactors may run out of on-site storage space by the middle of this decade.

The only away-from-site facility in the United States that is accepting spent nuclear fuel for storage is General Electric's facility at Morris, Illinois, sixty miles southwest of Chicago. Spent fuel from reactors both within and outside Illinois is stored at the Morris facility. But in December 1980 Illinois enacted the Spent Fuel Act, Ill. Rev. Stat. ch. 111½, § 230, which provides that "no person may dispose of, store, or accept any spent nuclear fuel which was used in any power generating facility located outside this State, or transport into this State for disposal or storage any spent nuclear fuel which was used in any power generating facility located outside this State . . . ." § 230.22. The Act makes an exception for imports of spent nuclear fuel from states

* Of the Southern District of Illinois.

that have a storage facility like Illinois' and have entered into a reciprocity agreement with Illinois, but it is a meaningless exception because, as mentioned, there is no other facility in the United States that is accepting spent nuclear fuel for storage away from the reactor site. The Act imposes a civil penalty of $10,000 per violation—$1,000 per day for a continuing violation—and also authorizes state officials to bring suits to enjoin violations. §§ 230.23, 230.24.

Three weeks after the passage of the Act, General Electric, joined by an out-of-state utility, Southern California Edison, which had shipped spent nuclear fuel to the Morris facility in the past and had a contract to ship additional amounts beginning early in 1981, brought suit in federal district court under 28 U.S.C. § 2201 (Declaratory Judgment Act) and 28 U.S.C. § 1331 (federal-question jurisdiction) against the state officials responsible for enforcing the Spent Fuel Act. The suit sought a declaration that the Act violates the supremacy and commerce clauses of the U.S. Constitution. Just a few hours after this suit (No. 81-2778 on our docket) was filed, the Attorney General of Illinois brought a suit (No. 81-2768) in state court under the Illinois Spent Fuel Act and other Illinois statutes and the common law to enjoin Southern California Edison from shipping spent nuclear fuel into Illinois and General Electric from receiving it. The defendants removed the state's suit to federal court, where it was consolidated with the federal suit, and moved for summary judgment in both suits. The motion was granted. The state has appealed, challenging the final judgment in both cases and also the district court's refusal to remand No. 81-2768 to the state court.

The district court erred in not remanding No. 81-2768. The removal of a state court action to federal court is authorized only if the cause of action arises under federal law, see 28 U.S.C. § 1441, and the cause of action in No. 81-2768 did not; it arose under Illinois law. The fact that Illinois law may be unconstitutional as applied to the defendants' activities is a matter of defense, not a ground for removal, even if the defend-

ants show that the state laws sued on by the plaintiff are totally preempted by federal law. *Illinois v. Kerr-McGee Chem. Corp.*, No. 81-1110 (7th Cir. May 4, 1982).

The state argues that there also is no federal jurisdiction over No. 81-2778. It says, first, that the companies failed to allege an actual controversy within the meaning of Article III of the Constitution and the Declaratory Judgment Act. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-74 (1950). When the companies' suit was filed the state had not brought its suit, and it argues that until that happened no one could be certain that the Spent Fuel Act would actually affect the Morris facility.

It might appear to be a matter of indifference, or at most a technical defect readily curable by amending the complaint, whether there was an actual controversy when the federal suit was filed or not until a few hours later, when the state suit was filed. But it could make a difference, even a practical one. If there was no federal jurisdiction until the state suit was filed, the state's argument, discussed later in this opinion, that even if the federal court had jurisdiction it should have abstained from exercising it might be strengthened. More important, the mere fact that the state sought injunctive relief against a threatened violation of the Act by the companies would not necessarily establish an actual controversy in the Article III sense; not being bound by Article III a state might allow a suit to be maintained in its courts though there was no actual controversy in that sense. Finally, technicality though it may be, there is considerable doubt, to say the least, whether a federal court can acquire jurisdiction retroactively. *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379, 381-82 (1884), holds that it cannot. If there was no jurisdiction when the complaint was filed the federal court had no power to act—even, perhaps, to the extent of allowing the complaint to be amended when a basis for federal jurisdiction came into being.

But we need not pursue these byways further in this case, because there was, we think, federal jurisdiction at the moment the federal complaint was filed, even though the filing of the state complaint came later. To consti-

tute an actual controversy "the disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effects its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 244 (1952). The disagreement between the state and the companies was not "nebulous or contingent" when the federal complaint was filed. The complaint alleged that Southern California Edison was about to ship spent nuclear fuel from California to the Morris facility. That shipment, and General Electric's receipt of it, would have been in patent violation of the statute and would have made the companies liable to pay heavy civil penalties. Of course the companies could have gone ahead and violated the law and then have set up its alleged unconstitutionality as a defense in any civil penalty or other enforcement action brought by the state—in No. 81-2768, for example. But that is true with any statute alleged to be unconstitutional: you can violate it and then defend your conduct in state court on constitutional grounds. If it followed that there was no actual controversy until a violation occurred, the federal courts would never have jurisdiction to enjoin the threatened enforcement of state legislation alleged to violate the Constitution (except possibly at the behest of someone who had violated the statute but not yet been prosecuted for the violation)—a proposition that cannot be maintained in the face of *Ex parte Young*, 209 U.S. 123 (1908), and innumerable cases following it. See, e.g., *Lake Carriers Ass'n v. McMullan*, 406 U.S. 498, 506-08 (1972); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Supreme Court of Va. v. Consumers Union of the U.S.*, 446 U.S. 719, 737 (1980).

It is true that where as in this case enforcement is merely threatened, a dispute may in fact lack sufficient concreteness and inevitability to be deemed an actual and not merely hypothetical controversy; it may be "unripe." In limiting the jurisdiction of the federal courts to "cases or controversies" Article III has been understood to express a policy, one that makes especially good sense in regard to constitutional adjudication, against rendering judgments that are either un-

necessary to resolve a real dispute or unlikely to be made in a competent fashion. When a suit is brought against a state before the state has actually done anything to the plaintiff, not only may the suit not be necessary to protect the plaintiff's interests—because the state may never in fact do anything to him—but the lack of an immediate conflict may deprive the court of the facts it needs to make an informed decision; it may also—a related point—reduce the parties' incentives to make a real contest of the case. See, e.g., *Regional Rail Reorganization Cases*, 419 U.S. 102, 143-45 (1974). So if it were uncertain whether the Spent Fuel Act really was applicable to the Morris facility, or to Southern California Edison's shipment of spent nuclear fuel to the facility, or whether Southern California Edison was really planning to ship spent nuclear fuel to Morris in the near future, or whether the state would actually enforce the statute, we might well conclude that there was no actual controversy between the state and the companies when they brought the suit.

The case would then be like *Wycoff*, *supra*, see 344 U.S. at 244, or our circuit's recent decision in *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 252-53 (7th Cir. 1981). The Attorney General of Illinois had announced at a press conference that he intended to bring lawsuits against violators of Illinois' environmental protection laws, and one of those violators, he said, was Nuclear Engineering Company, which operated a facility for storing hazardous wastes. A few days after the press conference the company sued the state in federal court, alleging that the Illinois laws in question could not constitutionally be applied to its facility. This court held that the threat of enforcement did not create an actual controversy between the state and the company. Nuclear Engineering was not challenging the validity of the state laws that the Attorney General was seeking to enforce against it. On the contrary, it claimed to be in full compliance with them, and if so it had nothing to fear from the carrying out of the Attorney General's threat—it was not a present or prospective violator. If the threat itself had had an adverse impact on Nuclear Engineering's business this might have created an actual

controversy between it and the state, but the court's "careful examination of the record . . . reveal[ed] not a shred of evidence in support of NEC's allegation of immediate business injury." *Id.* at 252. The company was asking the federal court for an advisory opinion that if the Illinois laws were construed—incorrectly in the company's view—in such a way as to force it to close its hazardous waste facility, the state would be violating the Constitution.

The present case is different. Not only is it certain that General Electric and Southern California Edison would be violating the Spent Fuel Act if Southern California Edison shipped spent nuclear fuel to Morris, as it intended (but for the state law) to do; but as the Act has only one conceivable target—the Morris facility—it is extremely unlikely that the state would overlook the violation. Adverse legal action was a distinct possibility when Nuclear Engineering filed its suit but it was a virtual certainty when General Electric and Southern California Edison filed theirs. While the difference is one of degree rather than of kind, it is enough we think to show that the controversy between the state and the companies in this case has real and immediate and not merely hypothetical or remote consequences for them.

The state makes the related jurisdictional argument that the companies' cause of action did not arise under federal law, as required for federal jurisdiction under 28 U.S.C. § 1331, the statutory basis of federal jurisdiction in this case. (The complaint also alleges diversity of citizenship, treating the named defendant, the Attorney General of Illinois, as a citizen of Illinois within the meaning of 28 U.S.C. § 1332; but the companies reserve rather than argue this basis for federal jurisdiction on this appeal, in view of its rejection in *Nuclear Engineering, supra*, 660 F.2d at 250-51.)

In *Nuclear Engineering*, after the company brought its suit the Attorney General of Illinois carried out his threat and sued the company. That created, in this court's view, an actual controversy and the court proceeded to consider whether there was a statutory basis for federal jurisdiction over it. Purists might consider

this part of *Nuclear Engineering* an advisory opinion (the court having held it had no jurisdiction), but however that may be its teaching is inapplicable to the present case. Since the only thing that created an actual controversy in *Nuclear Engineering* was the filing of the state's lawsuit, it seemed to this court that any federal suit which Nuclear Engineering might subsequently have filed would just have been an attempt to raise in federal court its federal defenses to the state court action. See 660 F.2d at 253-54. The company could not argue that its rights were being infringed by a state law that was inconsistent with one or more provisions of the Constitution, because it did not contend that the state law was invalid, and in any event it claimed to be complying with that law. All it could plead in its federal complaint was that *if* the state court accepted the Attorney General's proposed construction of state law, that law would violate its constitutional rights. The conditional assertion of a federal right is in reality the assertion of a federal defense. If this could be the basis of a federal suit, the rule mentioned earlier that forbids the removal of a state suit to federal court on the basis of a federal defense to that suit would be circumvented. But in the present case the companies are claiming an unconditional right under the Constitution to ship spent nuclear fuel into, and to receive it in, Illinois for storage notwithstanding the Spent Fuel Act. They can vindicate that right in a suit under section 1331. The commerce and supremacy clauses of the Constitution create rights enforceable in equity proceedings in federal court. See, e.g., *Lake Carriers' Ass'n*, *supra*, 406 U.S. at 502-03; *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

There is, it is true, a dictum in the *Wycoff* case, *supra*, which if it is the law could put the plaintiffs in this case right out of court: "Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court." 344 U.S. at 248. The impending state court action here was based on an alleged violation of state rather than federal law. Now at one level the dictum is an innocuous if perhaps

overbroad statement of the principle that you cannot get around the limitations on the removal jurisdiction of the federal courts by asserting your defenses in a federal declaratory judgment action. But at another level, if understood to require federal claimants always to litigate their claims as defenses in state court if they can, it must be wrong, and though lower federal courts have followed it from time to time the Supreme Court has not. For a perceptive discussion see Note, *Federal Jurisdiction over Declaratory Suits Challenging State Action*, 79 Colum. L. Rev. 983 (1979). Since the impending state action will almost always be based on state law alone, the dictum, read broadly, would overrule *Ex parte Young* and every case that has ever followed it. If not wrong, such a reading would still be an inappropriate flight of fancy for an inferior federal court to take.

Still, the companies here could, and did, raise their constitutional claims in defense of the state court action brought by the Attorney General; and the state argues, as an alternative ground for dismissal of the federal suit, that the district court, even if it had jurisdiction, should have abstained from exercising it and forced the companies to litigate exclusively in the state courts. There must be something wrong with this argument, because if it were accepted it would prevent people from ever challenging the constitutionality of state legislation in federal court. Every time someone brought a suit to have a state law declared unconstitutional the state would immediately file an action in state court to enjoin violation of the statute and then move the federal district court to stay or dismiss the federal suit, thereby forcing the federal plaintiff to litigate his federal claims by way of defense in the state court action. If to avoid being forced into state court in this way the federal claimant violated the statute and then brought a federal suit to enjoin its enforcement, his suit would almost certainly be dismissed under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971)—that federal courts ordinarily will not interfere in pending state prosecutions—provided only that the state brought some sort of enforcement proceeding before the federal suit was well advanced, see *Hicks v. Miranda*, 422 U.S. 322, 349

(1975). For the term "prosecution" has been broadened to include civil enforcement actions, clearly including the type of civil penalty suit that the state could have brought under the Spent Fuel Act if General Electric and Southern California Edison had gone ahead and violated the Act. See, e.g., *Trainor v. Hernandez*, 431 U.S. 434, 443-44 (1977); *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 50 U.S.L. Wk. 4712 (S. Ct. June 21, 1982).

The state is unable to cite any precedent for the contraction of federal jurisdiction that it is advocating. *Hicks v. Miranda*, *supra*, on which the state relies heavily, holds only "that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of [*Younger*] should apply in full force." The plaintiffs in *Hicks* had already violated the statute; that was what exposed them to state criminal prosecution. *Younger* holds that the state's interest in enforcing its laws without interference from a federal court takes precedence over the federal claimant's interest in litigating his claim in a federal forum. But the federal plaintiffs in the present case did not violate state law, so the state could not have brought a penalty action against them. The state's interest in maintaining law and order through enforcement of its penal statutes was not impaired by the federal lawsuit and the principle of the *Younger* case is therefore inapplicable. It is not the order of the suits that is important to the *Younger* doctrine but whether a state statute has been violated and the violator is being sued in state court.

The state also cites *Louisville Area Inter-Faith Comm. for United Farm Workers v. Nottingham Liquors, Ltd.*, 542 F.2d 652 (6th Cir. 1976). The defendant had obtained a temporary restraining order in state court against picketing by the plaintiff union. Rather than ask the state court to dissolve the order the union brought a federal suit to enjoin its enforcement as a violation of the union's First Amendment rights. The federal district

court dismissed the suit and the court of appeals affirmed. The court of appeals cited the *Younger* case—which is a bit surprising, since the state was not a party to the state court suit that the plaintiff in *Nottingham* was trying to enjoin—but did not hold that federal courts as a general rule will not exercise jurisdiction in a case where the plaintiff could raise his federal claim in a pending state court proceeding. The state judge who had issued the temporary restraining order was the logical person to consider, in the first instance at least, the union's claim that the order should be dissolved; judicial economy therefore required that the federal court stay its hand until the union applied to the state judge to dissolve his order. There is nothing like that in the present case. No state suit had even been filed when the federal suit was filed, let alone had proceeded to the point where the exercise of federal jurisdiction would have interrupted an active state court litigation.

In essence the state is asking us to adopt a rule of abstention that whenever parallel state and federal suits are pending, the federal suit must be stayed and the federal claimant remitted to state court. The cases do not support such a rule, and it would be hard to square with 28 U.S.C. § 1331(a), which explicitly grants the federal courts jurisdiction over civil suits arising under the Constitution. In every case that the state has cited the federal claimant had gone ahead and violated state law, thereby bringing into play the state's interest in redressing violations of its laws in its own courts. The message of *Younger* and of the recent cases that have expanded its principle to civil proceedings is that one who decides to violate a state law that he believes to be unconstitutional may find that he has thereby submitted himself to the jurisdiction of the state courts. Only if he goes to court before violating the law can he be assured of a federal forum, and then only if he satisfies the stringent jurisdictional requirements, discussed earlier in this opinion, for bringing a federal suit to enjoin merely threatened state enforcement action. If the state's position were correct, virtually no federal suit could ever be brought to challenge the constitutionality

of a state statute, at least if the statute was enforceable by the state itself. The state, upon learning that a federal suit had been filed, would have only to bring its own declaratory or injunctive suit to force the federal court to abstain from exercising jurisdiction. While there are arguments in favor of this result, for among other things it is unseemly to allow a single federal district judge to enjoin a state statute, it would be too radical a break with precedent to be decreed by a lower court.

The principle of *Younger* is of course only one part of the abstention doctrine. *Nottingham* illustrates another. When the constitutionality of a state statute depends on how the statute is construed, there is a third ground for abstention; but in the present case, as in *Zwickler v. Koota*, 389 U.S. 241, 249 (1967), the statute is unambiguous and—as we are about to see—no saving construction is possible.

We come at long last to the merits. General Electric and Southern California Edison challenge the constitutionality of the Spent Fuel Act on two grounds. The first is that it violates the commerce clause because it discriminates against interstate commerce. There is no dispute that the Spent Fuel Act applies only to spent fuel brought in from other states and that the Morris facility stores spent nuclear fuel from nuclear reactors located in Illinois as well as from out-of-state utilities such as Southern California Edison; in fact about half the spent fuel currently being stored comes from reactors in Illinois. However compelling the state's interest in safeguarding its residents from the hazards of radioactivity, that interest is unaffected by the origin of the radioactive material. Even if it is the movement rather than the storage of the spent nuclear fuel that is the source of the hazards about which the state is concerned, all spent nuclear fuel stored in the Morris facility was brought there from somewhere else yet the statute does not limit or forbid any intrastate movements, however lengthy or hazardous, nor even interstate movements so long as they do not end up at the Morris facility.

To pass laws that arbitrarily burden interstate commerce, by forbidding shipments merely because they originate out of state, violates the commerce clause, see, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 336-37 (1979), and it is irrelevant that the traffic is in "bads" rather than goods. The efficient disposal of wastes is as much a part of economic activity as the production that yields the wastes as a byproduct, and to impede the interstate movement of those wastes is as inconsistent with the efficient allocation of resources as to impede the interstate movement of the product that yields them. If Illinois may not arbitrarily prevent the importation of electricity generated by nuclear reactors in other states, or of nuclear fuel to power its own reactors, no more may it arbitrarily prevent the waste products of nuclear electricity generation from being imported for storage in the state. Nuclear wastes have to be stored somewhere, and the place of storage should be chosen without regard to the parochial interests of the states.

Yet contrary to what we have just said some early cases, the "quarantine cases" on which the state heavily relies, treat interstate commerce in "bads" as not commerce at all, see, e.g., *Bowman v. Chicago & Nw. Ry.*, 125 U.S. 465, 489 (1888), and thus hold that a state has a right to ban the importation of "convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded . . . in the sacred law of self-defense." *Hannibal & St. Joseph R.R. v. Husen*, 95 U.S. 465, 471 (1878). See also *Asbell v. Kansas*, 209 U.S. 251 (1908) (diseased cattle). *Shapiro v. Thompson*, 394 U.S. 618 (1969), which forbids the states to deny welfare benefits to new residents, casts a big shadow over *Husen*; but *Shapiro* is a fourteenth amendment "right to travel" case, not a commerce clause case (though there are glancing references in the opinions to a right to travel based on that clause, see 394 U.S. at 630 n.8, 666), and in any event does not apply to a nonhuman import, such as spent nuclear fuel.

The quarantine cases are helpful to the State of Illinois because the Supreme Court did not ask whether the state was treating intrastate "bads" the same way it was treating interstate ones. But maybe it did not ask because it thought the answer obvious. A state that bans the importation of paupers or diseased cattle probably does not do so out of affection for its local paupers and diseased cattle. The hostility is to the thing itself, not to merely interstate shipments of the thing; and an undiscriminating hostility is at least nondiscriminatory. But that is not the case here. The State of Illinois is quite willing to allow the storage and even the shipment for storage of spent nuclear fuel in Illinois, provided only that its origin is intrastate.

This case is governed not by the quarantine cases but by *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which held that New Jersey could not confine the use of its landfill waste dumps to New Jersey residents. The Court did distinguish the quarantine cases by stating that New Jersey's objection was not to the shipment but to the storage of wastes, see *id.* at 628-29, and the State of Illinois seizes on this distinction and argues that it does object to the shipment as well as storage of spent nuclear fuel. Its objection is unconvincing because it allows intrastate shipments, and even interstate shipments so long as they are not for the purpose of storage in Illinois. But a more satisfactory basis of distinction is, as we have suggested, that the quarantine cases involve state efforts to limit or prevent "bads" regardless of whether they come from in or outside the state. That evenhandedness is missing in this case as in *City of Philadelphia*, and it is not supplied by the hypothetical possibility, unexplored on this record, that the state might try to use its environmental protection laws to deal with the intrastate shipment or storage of spent nuclear fuel.

Though it may seem superfluous to consider whether the Spent Fuel Act is also unconstitutional under the supremacy clause, we shall do so in order to assist the Supreme Court should it decide to review this case and in doing so disagree with our analysis of the commerce

clause issue. Such a discussion may also assist the Court in deciding whether to review the case at all, in the event that review is sought and the Court agrees with us that federal jurisdiction exists and was properly exercised.

The Atomic Energy Act, 42 U.S.C. §§ 2011 *et seq.*, sets up a comprehensive scheme of federal regulation of atomic energy, administered by the Nuclear Regulatory Commission. The Act does not refer explicitly to spent nuclear fuel, but it does refer to the constituents of that fuel, see 42 U.S.C. §§ 2014(e), (z), (aa); 10 C.F.R. § 72.3(v); and the state does not, and could not, see 42 U.S.C. §§ 2073, 2111, question the Commission's authority to regulate the storage of spent nuclear fuel. Pursuant to that authority the Commission recently issued detailed regulations for the licensing of storage facilities—both at the reactor site and, as in the case of the Morris facility, away from the reactor site—for spent nuclear fuel. See 10 C.F.R. Part 72 (1981). These regulations forbid the acquisition, receipt, or possession of spent nuclear fuel for storage except under license from the Commission; and again its authority to require licensing is unquestioned. The Morris facility was licensed under an earlier set of regulations, 10 C.F.R. Part 70 (1980), and its license is up for renewal under the new regulations (Part 72, *supra*), see 45 Fed. Reg. 74698-99 (1980), but the validity of its license is not challenged.

The regulations, however, say nothing about shipment across state lines; and, curiously, there is no copy of the license for the Morris facility in the record, so that we do not know whether it expressly authorizes the receipt of spent nuclear fuel from other states. Although no one suggests that General Electric may be violating the license by receiving interstate shipments of spent nuclear fuel for storage at the Morris facility, it appears that neither the Act, the regulations under the Act, nor the license itself expressly authorizes such receipt—though there are some very broad hints in the regulations that it is authorized. See 10 C.F.R.

§§ 70.42(b)(5), 71.5. But this hardly matters. *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), aff'd without opinion, 405 U.S. 1035 (1972), holds that the Atomic Energy Act, in the words of a subsequent Supreme Court decision, "created a pervasive regulatory scheme, vesting exclusive authority to regulate the discharge of radioactive effluents from nuclear power plants in the [NRC], and pre-empting the States from regulating such discharges." *Train v. Colorado Public Interest Research Group*, 427 U.S. 1, 16 (1976). The analysis of the structure and legislative history of the Act in *Northern States* compels the conclusion that the Act equally preempts state regulation of the storage, and shipment for storage, interstate and intrastate alike, of spent nuclear fuel.

We do not think the State of Illinois would quarrel with anything we have said thus far on the issue of preemption. Its argument rather is that Congress, by passing and later amending section 116 of the Clear Air Act, 42 U.S.C. § 7416, has authorized the state to nullify the Commission's exercise of authority, presumably even to the extent of shutting down the Morris facility completely. Section 16 provides that "nothing in this Act shall preclude or deny the right of any State . . . to adopt or enforce . . . any requirement respecting control or abatement of air pollution." And "air pollution" is defined in the Clean Air Act Amendments of 1977 (amending section 302(g) of the Clean Air Act, 42 U.S.C. § 7602(g)) as including any "radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air." Since source material, special nuclear material, and byproduct material are the principal constituents of spent nuclear fuel, section 116 read in light of the amended section 302(g) appears to authorize the states to regulate air pollution caused by facilities such as that at Morris. But it does not, we believe, authorize the Spent Fuel Act.

Section 16 of the Clean Air Act qualifies federal powers only under that act. It does not purport to limit

federal powers under other statutes, such as the Atomic Energy Act, under which the Morris facility was licensed. At least that is what section 16 says, although an argument can be made from the legislative history that Congress intended to allow the states to adopt stricter standards than those imposed by the NRC under the Atomic Energy Act. See H. Rep. No. 294, 95th Cong., 1st Sess. 43 and n.8 (1977); *Consolidated Edison Co. of N.Y., Inc.*, 7 N.R.C. 31, 34 and n.13 (1978); *Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm'n*, 659 F.2d 903, 927 (9th Cir. 1981). But even so, for this expansive view of section 16 to be applicable to the Spent Fuel Act there would have to be some basis for regarding the Act as a measure for controlling (radioactive) air pollution; and we cannot find any. The Act places no limitation on the amount of radioactive emissions from the Morris facility or from shipments to the facility. And while one effect of the Act may be to reduce those emissions by eliminating interstate shipments to the facility, that is not enough to make the Act a rational pollution-control measure, especially when, for aught that appears, the facility emits no radioactivity into the air. We cannot believe that Congress in promulgating the Clean Air Act Amendments meant the states to have carte blanche to enact any statutes, and promulgate any regulations, that might as a side-effect reduce the amount of radioactive emissions in the state, regardless of how much the statute or regulation disrupted the federal atomic energy program, which includes as we have noted a program for disposing of nuclear wastes. That would be too much to read into those amendments.

The district court's judgment in No. 81-2768 and its order denying the state's motion to remand that case to state court are reversed, and the case is remanded to the district court with instructions to remand it to the state court where it began. The judgment in No. 81-2778 is

affirmed. The parties shall bear their own costs in this court.

So ORDERED.

A true Copy:
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Clerk of the United States Court of Appeals for the Seventh Circuit

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Appendix 2

United States Constitution, Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Appendix 3

United States Constitution
Article I, Section 8

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Appendix 4

United States Constitution
Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Appendix 5

Section 274 of Atomic Energy Act of 1954, as Amended

§ 2021. Cooperation with States

(a) Purpose

It is the purpose of this section—

(1) to recognize the interests of the States in the peaceful uses of atomic energy, and to clarify the respective responsibilities under this chapter of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials;

(2) to recognize the need, and establish programs for, cooperation between the States and the Commission with respect to control of radiation hazards associated with use of such materials;

(3) to promote an orderly regulatory pattern between the Commission and State governments with respect to nuclear development and use and regulation of byproduct, source, and special nuclear materials;

(4) to establish procedures and criteria for discontinuance of certain of the Commission's regulatory responsibilities with respect to byproduct, source, and special nuclear materials, and the assumption thereof by the States.

(5) to provide for coordination of the development of radiation standards for the guidance of Federal agencies and cooperation with the States; and

(6) to recognize that, as the States improve their capabilities to regulate effectively such materials, additional legislation may be desirable.

(b) Agreements with States

Except as provided in subsection (c) of this section, the Commission is authorized to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission under subchapters V, VI, and VII of this chapter, and section 2201 of this title, with respect to any one or more of the following materials within the State—

(1) byproduct materials;

(2) source materials;

(3) special nuclear materials in quantities not sufficient to form a critical mass.

During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.

(c) Commission regulation of certain activities

No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of—

(1) the construction and operation of any production or utilization facility;

(2) the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;

(3) the disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission;

(4) the disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.

Notwithstanding any agreement between the Commission and any State pursuant to subsection (b) of this section, the Commission is authorized by rule, regulation, or order to require that the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession or control of such product except pursuant to a license issued by the Commission.

(d) Conditions

The Commission shall enter into an agreement under subsection (b) of this section with any State if—

(1) The Governor of that State certifies that the State has a program for the control of radiation hazards adequate to protect the public health and safety with respect to the materials within the State covered by the proposed agreement, and that the State desires to assume regulatory responsibility for such materials; and

(2) the Commission finds that the State program is compatible with the Commission's program for the regulation of such materials, and that the State program is adequate to protect the public health and safety with respect to the materials covered by the proposed agreement.

(e) Publication in Federal Register; comment of interested persons

(1) Before any agreement under subsection (b) of this section is signed by the Commission, the terms of the proposed agreement and of proposed exemptions pursuant to subsection

(f) of this section shall be published once each week for four consecutive weeks in the Federal Register; and such opportunity for comment by interested persons on the proposed agreement and exemptions shall be allowed as the Commission determines by regulation or order to be appropriate.

(2) Each proposed agreement shall include the proposed effective date of such proposed agreement or exemptions. The agreement and exemptions shall be published in the Federal Register within thirty days after signature by the Commission and the Governor.

(f) Exemptions

The Commission is authorized and directed, by regulation or order, to grant such exemptions from the licensing requirements contained in subchapters V, VI, and VII of this chapter, and from its regulations applicable to licensees as the Commission finds necessary or appropriate to carry out any agreement entered into pursuant to subsection (b) of this section.

(g) Compatible radiation standards

The Commission is authorized and directed to cooperate with the States in the formulation of standards for protection against hazards of radiation to assure that State and Commission programs for protection against hazards of radiation will be coordinated and compatible.

(h) Consultative, advisory and miscellaneous functions of Administrator of the Environmental Protection Agency

The Administrator of the Environmental Protection Agency shall consult qualified scientists and experts in radiation matters, including the President of the National Academy of Sciences, the Chairman of the National Committee on Radiation Protection and Measurement, and qualified experts in the field of biology and medicine and in the field of health physics. The Special Assistant to the President for Science and Technology, or his designee, is authorized to attend meetings with,

participate in the deliberations of, and to advise the Administrator. The Administrator shall advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards and in the establishment and execution of programs of cooperation with States. The Administrator shall also perform such other functions as the President may assign to him by Executive order.

(i) Inspections and other functions; training and other assistance

The Commission in carrying out its licensing and regulatory responsibilities under this chapter is authorized to enter into agreements with any State, or group of States, to perform inspections or other functions on a cooperative basis as the Commission deems appropriate. The Commission is also authorized to provide training, with or without charge, to employees of, and such other assistance to, any State or political subdivision thereof or group of States as the Commission deems appropriate. Any such provision or assistance by the Commission shall take into account the additional expenses that may be incurred by a State as a consequence of the State's entering into an agreement with the Commission pursuant to subsection (b) of this section.

(j) Reserve power to terminate or suspend agreements

The Commission, upon its own initiative after reasonable notice and opportunity for hearing to the State with which an agreement under subsection (b) of this section has become effective, or upon request of the Governor of such State, may terminate or suspend its agreement with the State and reassert the licensing and regulatory authority vested in it under this chapter, if the Commission finds that such termination or suspension is required to protect the public health and safety.

(k) State regulation of activities for certain purposes

Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

(l) Commission regulated activities; notice of filing; hearing

With respect to each application for Commission license authorizing an activity as to which the Commission's authority is continued pursuant to subsection (c) of this section, the Commission shall give prompt notice to the State or States in which the activity will be conducted of the filing of the license application; and shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application.

(m) Limitation of agreements and exemptions

No agreement entered into under subsection (b) of this section, and no exemption granted pursuant to subsection (f) of this section, shall affect the authority of the Commission under section 2201(b) or (i) of this title to issue rules, regulations, or orders to protect the common defense and security, to protect restricted data or to guard against the loss or diversion of special nuclear material. For purposes of section 2201(i) of this title, activities covered by exemptions granted pursuant to subsection (f) of this section shall be deemed to constitute activities authorized pursuant to this chapter; and special nuclear material acquired by any person pursuant to such an exemption shall be deemed to have been acquired pursuant to section 2073 of this title.

(n) Definition

As used in this section, the term State means any State, Territory, or possession of the United States, the Canal Zone, Puerto Rico, and the District of Columbia.

Appendix 6

Spent Fuel Act

SPENT NUCLEAR FUEL

230.21. Spent nuclear fuel defined

§ 1. For the purposes of this Act, "spent nuclear fuel" means the irradiated energy source that is permanently removed from the core of a nuclear fission reactor either because it can no longer effectively sustain a chain reaction due to the depletion of fissionable isotopes and the buildup of by-products that interferes with the chain reaction or because safety or operating concerns dictate such removal.

P.A. 81-1516, Art. II, § 1, eff. Dec. 3, 1980.

230.22. Foreign spent nuclear fuel—Disposal or storage facilities—Reciprocity agreements

§ 2. No person may dispose of, store, or accept any spent nuclear fuel which was used in any power generating facility located outside this State, or transport into this State for disposal or storage any spent nuclear fuel which was used in any power generating facility located outside this State, unless the state of origin of such spent nuclear fuel has a facility, which is not part of a power generating facility, for the disposal or storage of spent nuclear fuel substantially like that of this State and has entered into a reciprocity agreement with this State. The determination as to whether the state of origin has a disposal or storage facility for spent nuclear fuel substantially like that of this State is to be made by the Director of the Department of Nuclear Safety and all reciprocity agreements must be approved by a majority of the members of both Houses of the General Assembly and approved and signed by the Governor.

P.A. 81-1516, Art. II, § 2, eff. Dec. 3, 1980.

230.23. Fines and penalties

§ 3. Any person who violates any provision of this Act shall be liable to a civil penalty of not to exceed $10,000 for each violation and an additional civil penalty of not to exceed $1,000 for each day during which violation continues.

P.A. 81-1516, Art. II, § 3, eff. Dec. 3, 1980.

230.24. Injunction—Violations

§ 4. The State's Attorney in a county where a violation occurs or Attorney General may institute a civil action for immediate injunction to halt any activity which is in violation of this Act.

P.A. 81-1516, Art. II, § 4, eff. Dec. 3, 1980.

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No. 82-648

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEIL HARTIGAN ~~TYRONE C. FAHNER~~, ATTORNEY GENERAL OF ILLINOIS, CHARLES P. ZALAR, STATE'S ATTORNEY OF GRUNDY COUNTY, and PHILIP GUSTAFSON, DIRECTOR OF THE ILLINOIS DEPARTMENT OF NUCLEAR SAFETY,

Petitioners,

v.

GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX

Appendix 6—Memorandum Opinion and Order of the United States District Court, Northern District of Illinois in *General Electric Co., et al. v. Tyrone C. Fahner, et al.*, No. 80 C 6835, filed October 12, 1981 ..... Supp. App. 1

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY, *Plaintiffs,* v. TYRONE C. FAHNER, Attorney General of the State of Illinois, CHARLES R. ZALER, State's Attorney for Grundy County, Illinois, and PHILIP GUSTAFSON, Director of the Illinois Department of Nuclear Safety, *Defendants.*	No. 80 C 6835
PEOPLE OF THE STATE OF ILLINOIS, ex rel. TYRONE C. FAHNER, Attorney General of the State of Illinois, *Plaintiffs,* v. GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY, *Defendants.*	No. 81 C 461

MEMORANDUM OPINION AND ORDER

These cases involve challenges to the constitutionality and enforcement of a provision of the Illinois Spent Fuel Act, Ill.Rev. Stat. ch. 111½, § 230-22 (Supp. 1981). This provision provides that:

> No person may dispose of, store, or accept any spent nuclear fuel which was used in any power generating facility located outside this State, or transport into this State for disposal or storage any spent nuclear fuel which was used in any power generating facility located outside this State, unless the state of origin of such spent nuclear

> fuel has a facility, which is not part of a power generating facility, for the disposal or storage of spent nuclear fuel substantially like that of this State and has entered into a reciprocity agreement with this State. The determination as to whether the state of origin has a disposal or storage facility for spent nuclear fuel substantially like that of this State is to be made by the Director of the Department of Nuclear Safety and all reciprocity agreements must be approved by a majority of the members of both Houses of the General Assembly and approved and signed by the Governor.

General Electric Company ("GE") and Southern California Edison ("SCE") are plaintiffs in case number 80 C 6835 and defendants in case number 81 C 461. They are opposed in each instance by Illinois Attorney General Tyrone Fahner. Additionally, the State of Illinois is a plaintiff in 80 C 461, while Charles R. Zaler, State's Attorney for Grundy County, and Philip Gustafson, Director of the Illinois Department of Nuclear Safety (collectively referred to as the "State"), are named as defendants in 80 C 6835.

GE operates a storage facility for spent nuclear fuel in Morris, Grundy County, Illinois. SCE ships spent nuclear fuel from its San Onofre, California nuclear plant to Morris for storage. GE and SCE challenge the constitutionality of the Spent Fuel Act as violative of the Supremacy Clause and the Commerce Clause of the Constitution. The cases are currently before the court on the motion of GE and SCE for summary judgment in case number 80 C 6835 and for declaratory relief in case number 81 C 461.

I.

GE and SCE[1] base their contention that the Spent Fuel Act is unconstitutional under the Supremacy Clause on the grounds, *inter alia*, that state regulation of the transportation and storage of spent nuclear fuel has been preempted by a federal statutory and regulatory scheme.

The doctrine of federal preemption originates in Article VI of the Constitution, the Supremacy Clause, which provides that:

> This Constitution, and the Laws of the United States shall be made in Pursuance thereof . . . shall be the the Supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

When a state's right to exercise its authority is challenged under the Supremacy Clause, a federal court must commence its analysis, with the position that "the historic powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). The court must then determine whether Congress either explicitly or implicitly prohibited the states from regulating the matters at issue. *See Pacific Legal Foundation v. State Energy Resources Conserv. & Develop. Comm'n*, 472 F.Supp. 191 (S.D. Cal. 1979).

Express preemption occurs when Congress has expressly provided that a federal regulation is intended to be exclusive, either in a federal statute or in the legislative history regarding that statute. *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956). Implied preemption can occur in several ways, including situations where a scheme of pervasive federal regu-

---

[1] GE and SCE are joined in their motions by the United States as *amicus curiae*. The State of Illinois is joined by the Citizens for a Better Environment as *amicus curiae* in opposition to the motions for summary judgment and declaratory relief.

lation exists supporting a reasonable inference that Congress did not intend for the states to supplement the regulatory scheme or where an Act of Congress deals with an area of dominant federal interest so that it is reasonable to assume that state regulation of the same area is precluded. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

In an earlier opinion, *General Electric Co. v. Fahner*, No. 80 C 6835 (N.D. Ill. May 22, 1981), this court rejected the State of Illinois' argument that the Spent Fuel Act is not preempted by federal law. In both instances, the state referred to the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, amending the Clean Air Act, 42 U.S.C. §§7401-642 (Supp. 1980), and accompanying legislative history, *see, e.g.*, House Conf. Rep. No. 95-564 (Aug. 3, 1977), 1977 U.S. Code Cong. & Ad. News 1523, as support for its position. While these provisions deal with state authority to regulate radioactive air pollutants, they are, in the wider scheme, but exceptions to the comprehensive federal plan for the regulation of nuclear fuel as originally set forth in the Atomic Energy Act of 1954, as amended. *See, e.g., Pacific Legal Foundation v. Energy Resources Conserv. & Develop. Comm'n*, 472 F.Supp. 191, 198 n. 5 (S.D. Cal. 1979). The passage of the Clean Air Act Amendments of 1977 does not give rise to an inference that Congress intended for the states to supplement existing laws governing the storage and transportation of spent nuclear fuel.

The Atomic Energy Act created a pervasive regulatory scheme with exclusive authority vested in the Atomic Energy Commission ("AEC").[2] *Northern States Power Co. v. Minnesota*, 447 F. 2d 1143 (8th Cir. 1971), *aff'd. mem.*, 405 U. S. 1035 (1972). Congress intended the mandate to the NRC to include the authority to license and otherwise regulate the use,

[2] The AEC was subsequently abolished by the Energy Reorganization Act of 1974. The AEC's licensing and related regulatory functions were transferred to the Nuclear Regulatory Commission ("NRC"). 42 U.S.C. § 5841(f)(1976).

possession and transfer of radioactive material. This grant of authority extends, by clear implication, to spent nuclear fuel as well.[3]

Procedures exist, however, for the "discontinuance" by the NRC and the "assumption" by the states of certain regulatory responsibilities that are otherwise exclusively vested with the NRC. Section 274 of the Atomic Energy Act, 42 U.S.C. § 2021. This occurs only after the state has entered into a "section 274 Agreement" with the NRC. The State of Illinois has not entered into such an agreement.

While a Section 274 Agreement would allow for a partial divestment of authority and control from the NRC, the states are also expressly prohibited from assuming control over specific aspects of the nuclear regulatory scheme. Thus, even if Illinois had entered into a Section 274 Agreement, it could not regulate production and utilization facilities. 42 U. S. C. § 2021(c). In conjunction with the retention of these areas of authority, the NRC promulgated regulations that expressly preserve exclusive licensing and regulatory authority over the "transfer, storage or disposal of radioactive waste material resulting from the separation in a production facility of special nuclear material from irradiated reactor fuel." 10 C.F.R. § 150.15(a)(4) (1980).

Moreover, several courts, beginning with *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd. mem.*, 405 U.S. 1035 (1972) have held that state regulation of nuclear waste is preempted by federal law. *See generally Train v. Colorado Pub. Int. Research Group, Inc.*, 426 U.S. 1, 14-18

[3] The NRC's authority is based on the fact that spent nuclear fuel constitutes "byproduct material," which is, in turn, defined as "radioactive material . . . yielded in . . the process of . . . utilizing special nuclear material." 42 U.S.C. § 2014(e). The ownership, custody, handling and disposal of byproduct material is regulated by the NRC pursuant to 42 U. S. C. §§ 2111-114 and regulations promulgated thereunder.

(1976); *Washington Building & Construction Trades Council v. Spellman*, No. L-81-154 (E.D. Wash. June 26, 1981) slip op. at 5-7; *State of Illinois v. Kerr-McGee*, No. 80 C 2776 (N.D. Ill. Jan. 8, 1981).

For the aforementioned reasons, this court holds that the Illinois Spent Fuel Act, inasmuch as it seeks to restrict the shipping and storage of spent nuclear fuel brought into Illinois, asserts state jurisdiction over an area of regulation preempted by an exclusive federal regulatory scheme. The Spent Fuel Act, therefore, is unconstitutional as violative of the Supremacy Clause.

II.

Next, GE and SCE contend that the Spent Fuel Act imposes an impermissible burden on interstate commerce in violation of the Commerce Clause, Article I, section 8 of the Constitution. The state asserts, on the other hand, that the Act comes within the quarantine exception to the Commerce Clause and, thus, is not unconstitutional.

The Commerce Clause provides, in part, that "Congress shall have Power . . . To Regulate Commerce . . . among the several States . . . ." This has been interpreted as reflecting "a central concern of the Framers . . . that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).

At the outset, there is no question but that the movement of nuclear waste in interstate commerce fits within the definition of "commerce" for constitutional purposes. *Washington Building & Construction Trades Council v. Spellman*, No. C 81 190, (E.D. Wash. June 26, 1981) slip op. at 8. *See Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978). Many areas of potential

federal regulation have escaped congressional attention by virtue of their local character. *Id.* at 623, *citing South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938). A statute is *not* in violation of the Commerce Clause as long as it serves a legitimate state interest and it is applied in a nondiscriminatory manner. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978). In those situations, however, the court must make a "delicate adjustment" of the conflicting state and federal claims." *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976), *quoting H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 553 (1949), (Black, J. dissenting).

The criteria for making this determination are set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). *See Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). *Pike* focuses, generally, on three areas: 1) whether the state law regulates evenhandedly; 2) whether it effectuates a legitimate local public interest; and 3) whether it has a minimal effect on interstate commerce. *Pike, supra* at 142.

Applying the *Pike* test, the court finds that the Spent Fuel Act regulates, not evenhandedly but discriminatorily, in its effect on interstate commerce. The Act prohibits the importation of spent nuclear fuel for disposal or storage in any off-site nuclear storage facility in Illinois unless a similar facility and reciprocal agreement exists with the state of origin. The Act is *per se* discriminatory. The Illinois legislature was aware of the fact that the Morris plant is the only off-site nuclear storage facility of its kind in the country. *See* Memorandum of General Electric Company and Southern California Edison Company in Support of their Motion for Summary Judgment at 26 n.* and **. Reciprocity, therefore, is impossible and, as such, the Act totally bans the importation for storage on the storage of spent nuclear fuel from outside of Illinois. *See generally Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976). Where, as is the case here, a state "overtly blocks the flow of

interstate commerce at state's borders," *Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978), the court need not proceed further under the *Pike* test as the statute is clearly in violation of the Commerce Clause. *Kassel v. Consolidated Freightways Corp.*, ____ U.S. ____, 49 U.S.L.W. 4328 (Mar. 24, 1981).

Finally, the court must address the state's assertion that the Spent Fuel Act comes within the ambit of the quarantine exception to the Commerce Clause. This argument is premised on the fact that some state regulations, even though they facially discriminate against interstate commerce, have been upheld because they represent "a legitimate attempt to protect the people of the State." *Sligh v. Kirkwood,* 237 U.S. 52, 59-60 (1915). *See Clason v. Indiana,* 306 U.S. 439 (1939); *Asbell v. Kansas,* 209 U.S. 251 (1908).

The same argument, however, was offered, and rejected, by the Supreme Court in *Philadelphia v. New Jersey,* 437 U.S. 417 (1978). In *Philadelphia,* the Court distinguished the quarantine cases from the case at hand, which involved a New Jersey statute that prohibited the importation of most "solid or liquid waste which originated or was collected outside the territorial limits of the State . . ." *id.* at 621, for the reason that the prohibition did not discriminate against interstate commerce, "but simply prevented traffic in noxious articles whatever their origin." *Id.* at 629.

The Court distinguished further the fact that no claim had been made that the very movement of waste into or through the state endangered health. *Id.* The transportation and storage of nuclear waste, of course, does pose a danger to the health of Illinois residents. But the inherent danger applies *equally* to all people. As the Court found in *Philadelphia,* there is no basis to distinguish between the danger to Illinois residents and that affecting the residents of the other forty-nine states. "If one is inherently harmful, so is the other." *Id.* The Spent Fuel Act, like the New Jersey statute, attempts to block the importation for storage and the storage of spent nuclear fuel in an off-site

facility "is an obvious effort to saddle those outside the State with the entire burden. . . ." *Id.* The Commerce Clause protects against the "efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all." *Id.*

In conclusion, this court holds that the Spent Fuel Act violates both the Supremacy Clause and the Commerce Clause of the Constitution. The statute is void and unenforceable. The motions of GE and SCE for summary judgment in case number 80 C 6835 and for declaratory judgment in case number 81 C 461 are hereby granted. Both cases are dismissed.

ENTER:

_____

UNITED STATES DISTRICT JUDGE

DATED: October 12, 1981

No. 82-648

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEIL HARTIGAN ~~TYRONE C. FAHNER~~, ATTORNEY GENERAL OF ILLINOIS, CHARLES P. ZALAR, STATE'S ATTORNEY OF GRUNDY COUNTY, and PHILIP GUSTAFSON, DIRECTOR OF THE ILLINOIS DEPARTMENT OF NUCLEAR SAFETY,

Petitioners.

v.

GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

In December, 1980, Illinois enacted a statute ("the Spent Fuel Statute") which prohibited the importation of spent nuclear fuel generated outside the state of Illinois if that fuel was to be stored at an away-from-reactor facility located within Illinois. General Electric Company ("General Electric")* operates such a storage facility at Morris, Illinois. Together with Southern California Edison Company ("SCE"),** which had a contract to store spent fuel at Morris, General Electric brought suit against the state officials charged with enforcing the Statute, seeking a declaratory judgment that it was unconstitutional.

Both the District Court and the Seventh Circuit Court of Appeals held the Spent Fuel Statute unconstitutional under the Commerce Clause, relying on this Court's decision in *City of Philadelphia* v. *New Jersey*, 437 U. S. 617 (1978), striking down a virtually identical statute. The only question properly presented to this Court is whether that determination was erroneous.***

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* Pursuant to Sup. Ct. Rule 28, General Electric states that it has no parent companies. A list of its subsidiaries (except wholly-owned subsidiaries) and affiliates is attached hereto as Exhibit A.

** Pursuant to Sup. Ct. Rule 28, SCE states that it has no parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates.

*** The first question presented by the Petition relating to the economic impact of the Statute was neither raised nor passed upon by the courts below and thus is not properly before this Court.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

General Electric's facility at Morris, Illinois, is the only operating commercial facility in the United States licensed by the United States Nuclear Regulatory Commission ("NRC") to accept and store spent nuclear fuel away from the site of the power plant where it was discharged. While the Morris facility provides an important service for those utilities that need to store fuel off-site, it has sufficient capacity to store only 750 tons of spent fuel, a small fraction of the 64,912 tons projected to be

discharged nationwide through the year 2000.[1] At the time the complaint was filed, 316 tons of spent fuel were stored at Morris, approximately 171 tons of which had been discharged from reactors located outside the state of Illinois. Of these 171 tons, 95 came from SCE's nuclear generating facility in San Onofre, California. When the Spent Fuel Statute was enacted into law, SCE had a contract to transport an additional 32 tons to Morris for storage during 1981 and 1982.

On December 3, 1980, the Illinois General Assembly enacted the Spent Fuel Statute, Ill. Rev. Stat. ch. 111½, §§ 230.21-.24 (1981), into law over the Governor's veto. As enacted, the law provides:

> "No person may dispose of, store, or accept any spent nuclear fuel which was used in any power generating facility located outside this State, or transport into this State for disposal or storage any spent nuclear fuel which was used in any power generating facility located outside this State, unless the state of origin of such spent nuclear fuel has a facility, which is not part of a power generating facility, for the disposal or storage of spent nuclear fuel substantially like that of this State and has entered into a reciprocity agreement with this State."

Because Morris is the only licensed and operating away-from-reactor facility in the country, the reciprocity provisions of the Statute are meaningless. The Spent Fuel Statute was

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[1] The capacity of the Morris plant is pleaded in the complaint, ¶ 11. The projection of nationwide discharges is taken from the United States Department of Energy's June, 1982 publication, "Spent Fuel Storage Requirements," DOE/RL-82-1. Only 3 per cent of the spent fuel discharged in the United States to date is presently stored at Morris. Even if its full capacity is utilized by the year 2000, only 1½ per cent of the nation's spent fuel will be stored there. Under these circumstances, there is clearly no factual basis for the fears expressed in the Petition that a failure to reverse the Court of Appeals' decision would make Illinois (and specifically Morris) the "dumping ground" for the nation's nuclear wastes and cast upon Illinois the "entire burden of nuclear waste disposal." See Petition at 6, 8.

designed to and in fact did prohibit General Electric from accepting spent nuclear fuel discharged anywhere outside the state of Illinois for storage at its Morris facility.

General Electric and SCE brought this action on December 24, 1980, seeking a declaratory judgment that the Spent Fuel Act was unconstitutional because, among other things, it placed an impermissible burden on interstate commerce in violation of the Commerce Clause and intruded into an area preempted by pervasive federal regulation in violation of the Supremacy Clause.[2] In defending the Statute against this attack, the State argued in both the District Court and the Court of Appeals, as it does here, that the Statute established a valid quarantine, and therefore did not violate the Commerce Clause. On the preemption issue, however, the State took a completely different approach than it is now taking. Nowhere in any of the numerous briefs or pleadings below did the State contend that the Statute was prompted by concern over the possibility that the Morris facility might be abandoned and that the state might be required to bear the cost of maintaining the site. Rather, the State argued that the Statute was an attempt to regulate radioactive emissions from spent fuel, which it contended was permissible under the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat 685.

Both the District Court and Court of Appeals rejected these arguments. In his opinion for the Seventh Circuit, Judge Posner first affirmed the District Court's holding that the Statute was not an attempt to quarantine spent fuel and thus

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[2] A few hours after this complaint was filed in federal court, the State filed what purported to be an enforcement action against SCE in state court, later joining General Electric as a defendant. General Electric and SCE removed that action, which was consolidated with the federal case. On appeal, the Seventh Circuit held that the removal had been improper and ordered the case remanded to state court. General Electric and SCE have not sought review in this Court of that determination.

could not escape the consequences under the Commerce Clause of its facial discrimination against goods originating outside the state. Then, although recognizing that it "may seem superfluous" to consider the preemption issue, Judge Posner went on to reject the State's arguments on that point as well.[3]

REASONS FOR DENYING THE WRIT

The Illinois Spent Fuel Act is indistinguishable from the New Jersey statute this Court held unconstitutional under the Commerce Clause in *City of Philadelphia* v. *New Jersey*, 437 U. S. 617 (1978). The State attempts to distinguish this case by characterizing the Statute as a quarantine measure designed to prevent the transportation of dangerous materials. Both lower courts, however, rejected this argument, noting that the Statute by its terms permits transportation of spent fuel within or through Illinois so long as out-of-state fuel does not come to rest within Illinois at an away-from-reactor site. There is no basis for disturbing this factual determination.

Because the lower courts were clearly correct on the Commerce Clause issue, there is no need for this Court to consider the preemption issue. However, even if the Court were required to review that issue, it cannot do so on the grounds suggested by the State in its Petition, which were not raised in the courts below.

The Petition argues that there is a "direct" conflict between the Seventh Circuit's decision in this case and the Ninth

[3] In his opinion, Judge Posner noted that the Statute, which prohibits storage of certain types of fuels rather than setting emission levels for those fuels, clearly was not designed to control radioactive air pollution. Thus, the Clean Air Act was irrelevant and the Spent Fuel Statute fell squarely within the Atomic Energy Act's preemption of state regulation of radiological hazards. See *Northern States Power Co.* v. *Minnesota*, 447 F. 2d 1143 (8th Cir. 1971), *aff'd*, 405 U. S. 1035 (1972).

Circuit's decision in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 659 F. 2d 903 (1981), on which this Court has granted certiorari, 102 S. Ct. 2956 (1982). The "conflict," however, is purely an after-the-fact invention by the Petitioner. In *Pacific Gas & Electric*, the Ninth Circuit was dealing with a state moratorium on nuclear power plants that was claimed to be based solely on economic considerations; because the court found that this provision had been "enacted for purposes other than protection against radiation hazards," it held that it was not preempted by federal regulation.[4] By contrast, until it reached this Court, the State had always characterized Illinois' Spent Fuel Statute as a radioactive pollution control measure. The Seventh Circuit's decision that the State's attempt to regulate spent fuel as a radiological hazard was preempted is entirely consistent with the Ninth Circuit's ruling.

The State's "discovery" of an economic motivation behind the Spent Fuel Act comes too late to be considered by this Court. The courts below were not given an opportunity to consider the argument, and there is no factual basis in the record for the State's assertion that the importation of spent nuclear fuel into Illinois for storage at the Morris plant poses a threat to the Illinois treasury.

Furthermore, under the State's own reasoning, if it prevails on the Commerce Clause argument, it must lose on the preemption issue, and if it prevails on the preemption issue, the Statute must be unconstitutional under the Commerce Clause. For, if the statute is a quarantine measure aimed at radioactive emissions, it is preempted, and if it is merely an economic regulation, it does not fall within the quarantine exception and thus is void under the Commerce Clause.

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[4] Section 274(k) of the Atomic Energy Act provides that the Act shall not be construed to affect the states' authority "to regulate activities for purposes *other than* protection against radiation hazards." 42 U. S. C. § 2021(k) (emphasis supplied).

Finally, the State argues that if the Atomic Energy Act preempts the Spent Fuel Statute, then the Act is an unconstitutional invasion of the State's right under the Tenth Amendment to control its own treasury. This argument also was not raised below and therefore cannot be considered here. In any event, any Tenth Amendment argument is clearly foreclosed by this Court's decision in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U. S. 264 (1981). Accordingly, the petition for certiorari should be denied.

I.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE SPENT FUEL STATUTE UNCONSTITUTIONALLY DISCRIMINATES AGAINST ARTICLES IN INTERSTATE COMMERCE SOLELY ON THE BASIS OF THEIR ORIGIN.

The Spent Fuel Statute on its face precludes the storage in Illinois of spent nuclear fuel *only* if that fuel was used in power plants located outside of the State. Similarly, the Statute prohibits the transportation into Illinois for storage of such nuclear fuel *only* if that fuel was used in power plants located outside of the State.[5] No restrictions whatsoever are imposed upon spent fuel discharged from plants located *within* Illinois.

[5] As noted above, General Electric's facility at Morris, Illinois is the only operating commercial facility in the United States licensed by the NRC to accept spent fuel for away-from-reactor storage. Therefore, even though the statute purports to allow the importation of spent fuel from other states if they grant reciprocal storage privileges, in practice, the Statute imposes a complete ban on the importation for storage purposes of spent fuel discharged outside the State of Illinois. However, even if some states could extend reciprocal storage privileges to Illinois, the statute would still be invalid. In *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U. S. 366 (1976), this Court made it clear that one state may not blackmail others into signing reciprocity agreements by refusing to accept their goods if they do not. See also *Sporhase* v. *Nebraska*, 50 U.S.L.W. 5115, 5119-5120 (U. S. 1982).

In holding this Statute unconstitutional, the courts below correctly found that it imposed an impermissible burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

A.

This Case Is Controlled By The Decision In *City Of Philadelphia* v. *New Jersey.*

Where a state statute regulates domestic and interstate activities evenhandedly and imposes only an incidental burden on interstate commerce, it will be upheld "unless the burden . . . is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). However, where the statute on its face discriminates against articles of commerce based solely on their out-of-state origin, this Court has applied the strictest scrutiny, approaching a "virtually *per se* rule of invalidity." *City of Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978); *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 36, (1980); *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979).

The case at bar clearly falls within the latter category and, indeed, is virtually on all fours with *City of Philadelphia* v. *New Jersey*. In that case, the Court struck down a 1974 New Jersey statute that prohibited the importation for disposal purposes of most types of "solid or liquid waste which originated or was collected outside the territorial limits of the State." 437 U. S. at 618. The New Jersey Supreme Court had upheld the statute against a Commerce Clause challenge on the ground that the importation of wastes that by definition could not be put to effective use was not "commerce" within the meaning of the Commerce Clause.

On appeal, this Court reversed. It rejected the New Jersey court's restrictive definition of "commerce," stating that "[a]ll

objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset. . . . Just as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement." *Id.* at 622-23.

After making the threshold determination that Commerce Clause principles applied to this material, the Court described the "crucial inquiry" as whether the statute

> " . . . is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."

Id. at 624. In resolving the issue, the Court stated that it was irrelevant whether the legislative motivation had been economic protectionism or a desire to protect the public health:

> "But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."

Id. at 626-27.

The Court noted that there was no basis for distinguishing out-of-state from domestic waste. Both types of waste presented identical health and pollution hazards. Under those circumstances, New Jersey was free to ban *all* wastes, to regulate *all* wastes, or to allow the unregulated disposal of *all* wastes, but it could not allow domestic wastes to be buried in its commercial landfills while prohibiting landfill operators from accepting out-of-state wastes.

The reasoning of this Court in *City of Philadelphia* is squarely applicable to the case at bar. Interstate movement of spent nuclear fuel, like interstate movement of solid or liquid wastes, is "commerce" within the meaning of the Commerce Clause. Thus, it may be regulated by Congress and may *not* be

unduly restricted by the states. Assuming *arguendo* that a state has the power to regulate spent nuclear fuel at all,[6] it must do so evenhandedly. Because spent fuel discharged in California or Wisconsin is identical in every respect to spent fuel discharged in Illinois, any statute that prohibits the storage or transportation of out-of-state, but not domestic, spent fuel, must be unconstitutional. This is true even if the State's only goal is to protect the public from possible hazards associated with the storage of spent fuel. As the Court held in *City of Philadelphia* v. *New Jersey*, even legitimate, non-discriminatory goals cannot be achieved by facially discriminatory means. Any other result would violate the concept of free interstate trade embodied in the Commerce Clause:

> "Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all." *Id.* at 629.

The same reasoning applies here. As the State itself recognizes, the disposal of spent nuclear fuel is a nationwide problem. The Commerce Clause cannot be interpreted to permit one state to isolate itself from that problem by declaring its storage facilities off-limits to all other states.

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[6] As the Seventh Circuit held, Congress has exercised its power to regulate spent nuclear fuel to such an extent that it has preempted the entire field. Thus, even if it did not discriminate against interstate commerce, the Spent Fuel Statute would be unconstitutional because it violates the Supremacy Clause.

B.

There Is No Reason To Disturb The Lower Courts' Finding That The Spent Fuel Statute Is Not A Quarantine Measure.

The State does not dispute the fact that the Spent Fuel Statute should be held unconstitutional if Commerce Clause principles apply. Rather, it bases its entire position on the argument that those principles do *not* apply because the Spent Fuel Statute is a quarantine measure and, as such, falls within the "quarantine exception" set forth in *Asbell* v. *Kansas*, 209 U. S. 251 (1908), and *Clason* v. *Indiana*, 306 U. S. 439 (1939). Even assuming that such an exception continues to exist, it is not applicable to the Spent Fuel Statute, which both lower courts have held is simply *not* a quarantine measure.

In *City of Philadelphia* v. *New Jersey*, this Court distinguished the quarantine cases on the ground that they involved articles whose "very movement risked contagion and other evils." By contrast, in the case before it there had been no claim that

> "the very movement of waste into or through New Jersey endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible. The harms caused by waste are said to arise after its disposal in landfill sites, and at that point, New Jersey concedes, there is no basis to distinguish out-of-state waste." 437 U. S. at 628.

The State has attempted to take advantage of the distinction made in *City of Philadelphia* by arguing that the very movement of spent fuel presents health hazards. But both courts below rejected this argument, on the ground that the Spent Fuel Statute is clearly aimed at preventing *storage*, not transportation of out-of-state spent fuel. Supp. App. at 8-9; App. at 14a. Despite the fact that all spent fuel necessarily presents the same hazards, if any, during transportation, the Spent Fuel Statute:

(i) does not prohibit the transportation *within* the State of Illinois of spent nuclear fuel discharged in Illinois;

(ii) does not prohibit the transportation *through* Illinois of spent fuel discharged elsewhere unless it is to be stored at an away-from-reactor facility in Illinois; and

(iii) does not prohibit and, indeed, specifically allows, the importation for storage purposes of spent nuclear fuel from any states that give Illinois reciprocal storage privileges.

Thus, as the Seventh Circuit held, the Statute, unlike a legitimate "quarantine" measure, reflects a hostility to the interstate nature of the spent fuel and not to the purported hazards of the fuel itself.

The lower courts' view of the Statute should be treated by this Court as a finding of fact which should not be disturbed absent a "very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949); *United States* v. *Ceccolini*, 435 U. S. 268 (1978). No such showing has been made here.

C.

The Court of Appeals Decision Is Consistent With Decisions In Other Circuits.

Not only was the Seventh Circuit's decision in this case consistent with, and indeed mandated by, *City of Philadelphia*, it is also consistent with decisions in other similar cases in the Tenth and Ninth Circuits.

In *Hardage* v. *Atkins*, 582 F. 2d 1264 (10th Cir. 1978), the court relied on *City of Philadelphia* in striking down an Oklahoma statute which, like the Spent Fuel Statute, prohibited the importation of waste material unless the state of origin had entered into a reciprocity agreement with the State of Okla-

homa. Similarly, in *Washington State Building & Construction Trades Council* v. *Spellman*, 684 F. 2d 627 (1982), the Ninth Circuit held that the Commerce Clause was violated by a Washington statute banning the importation for purposes of storage of low-level radioactive wastes. In its opinion the court rejected a quarantine argument similar to that made here, holding that while a state may "close its borders to protect citizens against health hazards such as epidemics," it may not use its citizens' health as an excuse to isolate itself from the "nationwide problem of waste disposal." *Id.* at 631.

II.

THE PREEMPTION ISSUE RAISED IN THE PETITION IS NOT PROPERLY BEFORE THE COURT.

Because the Court of Appeals was correct in holding the Spent Fuel Statute unconstitutional under the Commerce Clause, there is no reason for this Court to consider the first argument raised in the Petition, *i.e.*, that the Court of Appeals erred in holding the Spent Fuel Statute preempted by the pervasive federal regulation of nuclear power. However, even apart from the Commerce Clause issue, the argument advanced by the State against the lower court's holding on the preemption issue does not provide a basis for granting the Petition.

The State's preemption argument rests on this Court's grant of certiorari in the case of *Pacific Gas & Electric Company* v. *State Energy Resources Conservation & Development Commission*, 659 F. 2d 903 (9th Cir. 1981). There, the Ninth Circuit upheld against a Supremacy Clause challenge a California moratorium on the certification of new nuclear plants until there is a federally approved method of nuclear waste disposal. The court held that the Atomic Energy Act, while preempting state regulation of radiological hazards, was not intended to impair a state's ability to regulate its public utilities or to address legitimate economic concerns. It then delved into the

extensive legislative history behind the California moratorium, determining that it was an economic rather than a safety measure. The court found that the legislature had been concerned that the lack of any nationwide disposal strategy created "uncertainties in the nuclear fuel cycle [which] make nuclear power an uneconomical and uncertain source of energy." 659 F. 2d at 925. California's decision to prohibit its utilities from constructing new nuclear plants until these uncertainties were resolved was held to be within the state's power to regulate in its economic interest.

Here, by contrast, until the instant Petition was filed, Illinois' Spent Fuel Statute had always been defended purely as a *safety* measure. In its opinion, the Seventh Circuit, like the Ninth Circuit in *Pacific Gas & Electric*, relied on the holding in *Northern States Power Co.* v. *Minnesota*, 447 F. 2d 1143 (8th Cir. 1971), *aff'd*, 405 U. S. 1035 (1972), that pervasive federal regulation of the nuclear power industry preempts state regulation of radiological hazards. The Seventh Circuit went on to state that

> "[t]he analysis of the structure and legislative history of the Act in *Northern States* compels the conclusion that the Act equally preempts state regulation of the storage, and shipment for storage, interstate and intrastate alike, of spent nuclear fuel." App. at 16a.

It then rejected the State's argument that the Spent Fuel Statute was a permissible state regulation of radioactive air pollution under the Clear Air Act Amendments of 1977.

In its Petition, the State does not dispute the holding of both the Seventh and Ninth Circuits that state safety regulations aimed at radiological hazards are preempted.[7] Rather, it

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[7] Numerous cases have held that federal regulation of radiological hazards pursuant to the Atomic Energy Act is so pervasive that it preempts any state regulation in this area. See, *e. g.*, *Northern States Power Co.*, v. *Minnesota*, 447 F. 2d 1143 (8th Cir. 1971), *aff'd*,

(Footnote continued on following page)

argues that the Seventh Circuit should have viewed the Illinois Statute, like the Ninth Circuit viewed the California moratorium in *Pacific Gas & Electric*, as having been motivated by strictly economic concerns. The State contends that the ban on the storage of out-of-state spent fuel was designed solely to ensure that the capacity of the Morris facility would not be exhausted in the very near future. It hypothesizes that once the storage pools are full, General Electric will no longer have an economic incentive to maintain the facility and "will likely abandon it," leaving the state to bear the cost of caring for the facility. Petition at 7. The State chastises the Court of Appeals for "ignor[ing]" the true purpose of the Statute and argues that its erroneous interpretation puts the Seventh Circuit in conflict with the Ninth. There are a number of reasons why this argument must be rejected.

First, the courts below can hardly be faulted for not adopting the State's current view of the Statute's purpose, since it is an entirely new argument raised for the first time in this Court. As both of the opinions below demonstrate, the State in its arguments to the lower courts concentrated exclusively on the hazards associated with radiation allegedly emitted by the spent fuel. Thus, its sole argument on the preemption issue in the Court of Appeals was as follows:

> "The State has alleged, and for purposes of this appeal it must be taken as true, that the transportation of spent nuclear fuel into Illinois would generate possibly dan-

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(Footnote continued from preceding page)

405 U. S. 1035 (1972); *Train* v. *Colorado Pub. Int. Research Group, Inc.*, 426 U. S. 1, 15-17 (1976). The transportation, storage, and disposal of spent fuel are comprehensively regulated by the NRC and thus fall within the category of activities the states are prohibited from regulating. The design, siting, licensing and operation of away-from-reactor facilities are all regulated under 10 C. F. R. Part 72; the packaging and transportation of special nuclear material including spent fuel is governed by 10 C. F. R. Part 71.

gerous amounts of radioactive air pollution. The Spent Fuel Act, by prohibiting the introduction of this pollution source, is thus a state regulation of radioactive air pollution authorized by the Clean Air Amendments." State's Opening Brief at 57; see also Reply Brief at 27.

It is well settled that this Court will not review issues that the Petitioner failed to raise below. See *Tacon* v. *Arizona*, 410 U. S. 351 (1973) (dismissing writ as improvidently granted where the issues on which the grant was based had not been raised below or passed upon by the court below); *Hill* v. *California*, 401 U. S. 797, 805 (1971). That rule necessarily precludes consideration of the State's newly presented argument in this case.

One of the major reasons for refusing to review issues not raised below is the lack of a proper record on the new issue. In this case there is simply no basis in the record for the essential factual predicates of the new argument. Furthermore, the suggestion that General Electric is likely to abandon Morris once it reaches capacity because it will become uneconomical to maintain simply has no basis in fact. All fuel stored at Morris is stored there on a temporary basis and most of the utilities that own the fuel compensate General Electric for the privilege of keeping it there. In addition, as a General Electric representative testified in legislative hearings, "[f]uel storage facilities are very expensive and benefit greatly from the economies of scale." (Statement of Dr. Bertram Wolfe before the House Committee on Environment Energy and Natural Resources, June 7, 1979). That is, in a larger storage facility, the fixed costs can be more effectively spread among the users. Thus, General Electric's economic position will be enhanced, not harmed, by the utilization of Morris' full capacity. It should also be noted that the NRC's regulations require licensees to make elaborate provisions for decommissioning away-from-reactor facilities. 10 C. F. R. §§ 72.18, 72.31(a)(10), 72.38, 72.76.

There is also no basis in the legislative history for ascribing to the Illinois legislature any fear that the facility would be abandoned, or any hope that a limitation on its capacity would forestall abandonment. Indeed, there is not even a *mention* of the possibility that the Morris facility was in danger of abandonment in any of the debates that have been transcribed. There is, however, ample legislative history, which the State quoted in the Court of Appeals, demonstrating the legislature's concern with the alleged radiation hazards associated with spent fuel.[8]

Second, the Seventh Circuit's view of the law simply does not conflict with the view expressed by the Ninth Circuit in *Pacific Gas & Electric.* Because it treated the Statute as an attempt to regulate radiological hazards, the Seventh Circuit found it unnecessary even to reach the issue of a state's power to regulate for economic purposes, which was the keystone of the court's analysis in *Pacific Gas & Electric.* The lack of any real conflict between the two Circuits is also confirmed by the Ninth Circuit's subsequent opinion in *Washington State Building & Construction Trades Council* v. *Spellman, supra,* 684 F. 2d at 630, where the court held that Washington's attempt to prohibit the importation for storage purposes of low-level radioactive wastes was preempted by the Atomic Energy Act.

Third, and finally, the interrelation between the State's Commerce Clause and preemption arguments is such that the Statute must be considered invalid on one theory or the other. If the Statute is based on economic motives, as the State argues in Part I of its Petition, then it cannot be considered a quarantine measure designed to protect the citizens of Illinois

[8] For example, one senator, in a remark quoted by the State, urged an override of the Governor's veto on the ground that "the citizens of this State [should not] be subjected to the risk of radiation that's been generated in other states. . . ."

from radiation hazards. But without the quarantine exception, even the State concedes that the Statute must be held unconstitutional under the Commerce Clause.[9]

If, on the other hand, the State's argument in Part II of the Petition is correct and the Spent Fuel Statute *is* a quarantine measure designed to protect the citizens of Illinois against radiation hazards, then it cannot fall within the category of "economic" measures carved out by the court in *Pacific Gas & Electric*. Rather, it must be considered a "safety" regulation, which both the Seventh and Ninth Circuits agree is preempted by the pervasive federal regulation of radiological hazards.

III.

THE TENTH AMENDMENT ARGUMENT IS FRIVOLOUS AND SHOULD NOT BE CONSIDERED BY THIS COURT.

In Part I-B of its Petition, the State argues that if the Atomic Energy Act was intended to preempt measures like the Spent Fuel Statute, then it interferes with each state's right to control its treasury in violation of the Tenth Amendment. Like the State's preemption argument, this argument is also predicated on the erroneous assumption that the Spent Fuel Statute is an economic measure. Furthermore, like the preemption argument, the Tenth Amendment claim was not raised or passed on in the courts below, and therefore should not be considered by this Court.

---

[9] This is particularly true if the goal was simply to limit the amount of fuel being added to the Morris facility, since that goal could easily have been accomplished by limiting the number of tons to be added without regard to where that tonnage was generated. Where a state chooses the most, rather than the least discriminatory means of accomplishing its goal, it clearly trangresses the limitations imposed by the Commerce Clause. *Hughes* v. *Oklahoma*, 441 U. S. 322, 337 (1979).

In any event, the Tenth Amendment claim is frivolous in light of this Court's decision in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U. S. 264 (1981). At issue in *Hodel* was the constitutionality of a federal statute regulating strip-mining which explicitly preempted state regulation unless it met certain conditions. It was argued that the statute was unconstitutional because, among other things, it invaded powers reserved to the states under the Tenth Amendment. This Court rejected that argument, holding that its decision in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), on which the State relies in this case, could not be extended to cases where federal statutes interfere with, or even totally preempt, the exercise of traditional state functions such as land-use planning. The Court, in effect, limited *National League of Cities* to its facts, holding that the Tenth Amendment prohibits only direct federal regulation of *state* activities and does not "shield [ ] the States from pre-emptive federal regulation of *private* activities affecting interstate commerce." 452 U. S. at 291 (emphasis in original).

Hodel disposes of the State's contention here that the Tenth Amendment prohibits Congress from preempting state regulation of nuclear wastes if that regulation has an indirect impact on state treasuries. Unlike the federal statute at issue in *National League of Cities*, the Atomic Energy Act does not order the states to make particular expenditures, nor does it purport to regulate states in their *governmental* capacities; rather, like the strip-mining statute in *Hodel*, the Atomic Energy Act regulates only *private* conduct—in this case the private use of nuclear energy. The fact that this regulation of private conduct may indirectly require some state spending clearly does not render the federal regulation unconstitutional under the Tenth Amendment.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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EXHIBIT A

The following are the subsidiaries (except wholly owned subsidiaries) and affiliates of General Electric Company.*

Evansville Cable TV, Inc.

Utah Development Company

Waipipi Iron Sands Limited

Central Queensland Coal Associates

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General Electric-Rickard Ltd.

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Storno Electronic GmbH

Westdeutsche Quarzschmelze GmbH

SADELMI-COGEPI Compagnia Generale Progettazioni e Installazioni S.p.A.

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* General Electric Credit Corporation and General Electric Overseas Capital Corporation are wholly-owned subsidiaries of General Electric Company, but each has issued debt instruments which are publicly held.

Engineering Plastics, Ltd.

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Iran Electrical and Mechanical Service Company

Middle East Engineering Limited—UAE

General Electric Philippines Meter and Instruments Co., Inc.

General Electric CAE International, Incorporated

General Electric Mortgage Corporation

Lonestar Florida Pennsuco, Inc.

No. 82-648

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

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Petitioners,

v.

GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF ON PETITION FOR CERTIORARI

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IN THE

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OCTOBER TERM, 1982

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GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF ON PETITION FOR CERTIORARI

Petitioners submit this reply to the brief in opposition of Respondents General Electric Company and Southern California Edison Company and the brief of *amici curiae* Baltimore Gas & Electric Company, *et al.*

Respondents and *amici* characterize the Illinois Spent Fuel Act as nothing more than a protectionist measure by which Illinois seeks to isolate itself from the problem of nuclear waste disposal. This characterization admits that nuclear waste disposal is a national problem, but ignores the reality of the lack of a national solution to the problem and the burden the lack of a national solution places upon one state, Illinois, the site of the Morris Facility, the Nation's only commercial away-from-reactor spent nuclear fuel storage facility. The Spent Fuel

Act is not a selfish attempt to protect the resources of the Morris Facility for Illinois residents. Rather, the Act is a preventive measure, designed to ensure that Illinois does not become the dumping ground for the entire Nation's nuclear waste, that the Morris Facility is not abandoned, and that the taxpayers and treasury of Illinois are not forced to bear the burden of abandonment.[1] By invoking unfounded claims of protectionism, respondents and *amici* seek to characterize this case as a "routine" preemption and Commerce Clause case and fail to address the important, recurring issues that require this Court's attention.

I.

THE ARGUMENTS OF PETITIONERS REGARDING PREEMPTION ARE PROPERLY BEFORE THIS COURT

The courts below considered two issues in this case: (1) whether the Atomic Energy Act ("AEA") preempted the Spent Fuel Act; and (2) whether the Spent Fuel Act is unconstitutional under the Commerce Clause. The arguments in the Petition concerning preemption raise the question of the scope of state authority under section 274(k) of the AEA, which expressly grants states the authority to regulate certain aspects of nuclear energy. As the nuclear problem continues to grow throughout the Nation, the question of state authority over nuclear waste and power becomes more and more important to

[1] Respondents and *amici* dismiss abandonment and ultimate state ownership and responsibility as unlikely results of continued use and eventual exhaustion of storage space at the Morris Facility. Yet, as respondents and *amici* are well aware, nuclear waste disposal sites are often abandoned, and states are often required to assume responsibility for abandoned sites. *Amici* concede as much, noting that the State of New York recently assumed responsibility for a disposal and storage site at West Valley that had been abandoned by its private owner. Brief of *Amici* at 6. Private owners have similarly abandoned sites in Sheffield, Illinois and Maxey Flats, Kentucky.

the several states and to the Nation as a whole, and is a question that will recur again and again until resolved by this Court. Under these circumstances, this Court should consider Petitioners' arguments regarding preemption. *See Carlson* v. *Green*, 446 U. S. 14, 17 n. 2 (1980); *Youakim* v. *Miller*, 425 U. S. 231 (1976); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 320-21 n. 6 (1971).

The arguments raised by Petitioners concerning preemption are properly before this Court for the additional reason that the failure of the courts below to consider the arguments constitutes plain error warranting notice by this Court. This Court has long recognized the basic principle that a statute is presumed to be valid and constitutional. *Flemming* v. *Nestor*, 363 U. S. 603, 617 (1960); *Cooper* v. *Telfair*, 4 U. S. (Dall.) 14, 18 (1800). Indeed, "[e]very presumption is to be indulged in favor of the validity of [a] statute." *Gitlow* v. *United States*, 268 U. S. 652, 668 (1925). Courts must be particularly "indulgent" in preemption cases in view of this Court's admonition that federal preemption is to be narrowly construed, and, thus, courts may not "seek[ ] out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 446 (1960) (citations omitted).

The Spent Fuel Act must, therefore, be presumed to be valid, especially in the face of a claim that it is preempted. Because of this strong presumption, a court must examine every reasonable ground upon which the Act could be held valid so as to avoid the conclusion that the statute is invalid. *See Porter* v. *Investors Syndicate*, 286 U. S. 461 (1932); *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, 311 (1913). Among the reasonable grounds in favor of validity of the Act is Petitioners' argument that the Act is explicitly authorized under Section 274(k). The courts below failed erroneously to consider this argument, an obvious and clear error that this Court should notice. *See Connor* v. *Finch*, 431 U. S. 407, 421 n. 19 (1977); *Washington*

v. *Davis*, 426 U. S. 229, 238 (1976); *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936).[2]

II.

RESPONDENTS AND *AMICI* RELY ERRONEOUSLY ON THE DECISION OF *HODEL* V. *VIRGINIA SURFACE MINING & RECLAMATION ASSOCIATION*, 452 U.S. 264 (1981).

This case is readily distinguishable from this Court's recent decision in *Hodel*. The federal statute at issue in *Hodel* failed to meet the initial requirement necessary to hold a federal statute violative of the Tenth Amendment. That requirement is that the federal statute must directly regulate the "States as States." Because the federal statute at issue in *Hodel* did not require states to take any action and did not prohibit states from taking any action, this Court concluded that the statute did not regulate the "States as States," but only regulated private industry. By contrast, the AEA, as interpreted by the Court of Appeals, "commandeers" Illinois by prohibiting it from taking the steps necessary to protect its treasury and by compelling Illinois to risk, and likely expend, state funds. *See* 452 U. S. at 288. So interpreted, the AEA is regulation of the "States as States" in the most direct and obvious form.[3]

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[2] At a minimum, this Court should vacate the judgment below and remand the case for consideration of Petitioners' argument that Section 274(k) expressly authorizes the Spent Fuel Act. *See, e.g., G. D. Searle & Co.* v. *Cohn*, 102 S. Ct. 1137, 1144 (1982); *Youakim* v. *Miller*, 425 U. S. 231, 236-37 (1976).

[3] The AEA, as interpreted by the Court of Appeals, also satisfies the second and third requirements necessary to hold a federal statute violative of the Tenth Amendment. The ability of a state to control its own treasury is a fundamental "attribute[ ] of state sovereignty," and application of the AEA, as interpreted, would impair the freedom of Illinois to control state expenditures and structure integral operations of its treasury, both of which are traditional governmental functions. 452 U. S. at 287-288.

The decision in *Hodel* is also distinguishable from this case, because the state governmental function at issue there—regulation of land use—is a function exercised under the police power of the state. As this Court recognized in *Hodel*, the law is well-settled that federal legislation that displaces state legislation enacted pursuant to state police power does not violate the Tenth Amendment. The Spent Fuel Act, however, does not involve the exercise of state police power; it is directed toward protection and control of the state treasury, a traditional governmental function essential to establishing and maintaining state sovereignty. The Spent Fuel Act was enacted to prevent Illinois from becoming the dumping ground for the entire Nation's spent fuel and, thus, to reduce the risk of abandonment or other problems at the Morris Facility that might drastically impact the state treasury. The Tenth Amendment prohibits Congress from infringing state sovereignty by imposing restrictions on the freedom of a state to exercise traditional governmental functions, such as protecting and controlling the state treasury. The Tenth Amendment, therefore, compels reversal of the Court of Appeals' interpretation of the AEA.

III.

THE ILLINOIS SPENT FUEL ACT IS A VALID QUARANTINE MEASURE.

Respondents and *amici* argue that the Spent Fuel Act is not a legitimate quarantine measure similar to the statutes upheld in *Asbell* v. *Kansas*, 209 U. S. 251 (1908), and *Clason* v. *Indiana*, 306 U. S. 439 (1939). The starting point for determining whether a statute is a valid quarantine measure is whether the statute prohibits transportation into a state of noxious articles whose "very movement risk[s] contagion and other evils" or articles that "must be disposed of as soon and as close to their point of generation as possible." *City of Philadelphia* v. *New Jersey*, 437 U. S. 617, 629 (1978). The Spent

Fuel Act expressly prohibits transportation of spent fuel into Illinois. Whether the very movement of spent fuel risks contagion or other evils, or whether spent fuel must be disposed of as close to the point of generation as possible, are factual questions raised by Petitioners, but not decided by the courts below. The existence of a controlling issue of fact renders the entry and affirmance of summary judgment by the courts below improper and erroneous. *Phillips* v. *Martin Marietta Corporation*, 400 U. S. 542, 544 (1971); *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 256-57 (1948).

Respondents and *amici*, however, assert that summary judgment was appropriate, because, in their view, the Spent Fuel Act is not aimed at prohibiting transportation of spent fuel, but only at preventing storage of spent fuel in Illinois. Respondents and *amici* base this assertion on the ground that the Act permits intrastate shipments of spent fuel, shipments of spent fuel through Illinois, and shipments of spent fuel to Illinois if the state from which the spent fuel is shipped has entered into a reciprocity agreement with Illinois.

Contrary to the assertion of respondents and *amici*, the allowance of intrastate shipments does not invalidate the Act as quarantine measure. The quarantine cases permitted intrastate shipments, recognizing that noxious articles may not always be disposed of at the point of generation because of the lack of disposal facilities or other practical reasons, but should be disposed of as close as possible to the point of generation.

The allowance of interstate shipments through Illinois and interstate shipments under the reciprocity provision is also of no significance when the Act is tested, as it must be, by its practical application. *Near* v. *Minnesota*, 283 U. S. 697, 708 (1931); *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 237 (1917). Respondents and *amici* freely admit that the Morris Facility is the only commercial away-from-reactor spent fuel storage facility in the Nation. Therefore, neither interstate commercial shipments through Illinois nor interstate com-

mercial shipments to Illinois under the reciprocity provision will occur. As practically applied, then, the Act prohibits all commercial interstate shipments into Illinois, and is no different from the quarantine measures repeatedly upheld by this Court. Because construction of the Act in light of its practical application renders the Act constitutional under the quarantine cases, the Act must be so construed and upheld as constitutional. *See St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U. S. 772, 780 (1981); *Porter* v. *Investors Syndicate*, 286 U. S. 461 (1932).[4]

[4] Even if this Court were to accept the argument of respondents and *amici* that the Act is not a valid quarantine measure because the Act permits shipments through Illinois and shipments under the reciprocity provision, the Act may not be stricken in its entirety, but only those parts of the Act referring to through shipments and shipments under the reciprocity provision may be stricken. *See Dorchy* v. *Kansas*, 264 U. S. 286, 289-90 (1924); *El Paso & Northeastern Ry. Co.* v. *Gutierrez*, 215 U. S. 87, 96 (1909); *Berea College* v. *Kentucky*, 211 U. S. 45, 54-56 (1908).

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit for the reasons stated in the Petition for Certiorari.

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No. 82-648

IN THE

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OCTOBER TERM, 1982

NEIL HARTIGAN
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GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* BALTIMORE GAS & ELECTRIC COMPANY, *ET AL.*

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* BALTIMORE GAS & ELECTRIC COMPANY, *ET AL.*

Amici curiae Baltimore Gas & Electric Company, Carolina Power & Light Company, Connecticut Yankee Atomic Power Company, Florida Power & Light Company, Georgia Power Company, Gulf States Utilities Company, Middle South Services, Inc., Northeast Nuclear Energy Company, Northern States Power Company, Pennsylvania Power & Light Company, The Connecticut Light & Power Company, The Hartford Electric Light Company, Virginia Electric & Power Company, Western Massachusetts Electric Company, Wisconsin Electric Power Company and Wisconsin Public Service

Corporation (hereinafter "Public Utilities") submit this brief in opposition to the Petition For A Writ Of Certiorari filed in this case by Tyrone C. Fahner, Attorney General of Illinois (hereinafter "the State"). All parties have consented to the filing of this brief; copies of the consents have been filed with the Clerk.

INTEREST OF *AMICI CURIAE*

The Public Utilities are companies that operate or are constructing commercial nuclear power plants outside the State of Illinois. These plants generate, or will generate, spent nuclear fuel during the course of normal operation. Had it not been held unconstitutional in the court below, the Illinois Spent Fuel Act, Ill. Rev. Stat. ch. 111 1/2, §§ 230.21-.24 (1980), would have precluded the Public Utilities from storing their spent fuel at the General Electric spent fuel storage facility at Morris, Illinois. The Morris facility is the only "away-from-reactor" spent fuel storage facility ("AFR") in the United States that is currently accepting commercial spent fuel.

The Act also would have had serious implications for the nation's nuclear power industry and for the implementation of a national program for the management of spent fuel and the permanent disposal of nuclear wastes. Had it been upheld, the Act would have established the principle that any state could stop at its borders spent fuel and radioactive wastes destined for a radioactive waste repository or interim storage facility in that state, notwithstanding the national interests involved. Indeed, the philosophy underlying the Act would allow each state to prohibit transportation into that state of virtually any arguably hazardous item from its sister states.

Because of these concerns, the Public Utilities participated as *amici curiae* in this case both at the district court and at the court of appeals, urging that the Spent Fuel Act should be held unconstitutional. The Public Utilities likewise urge here that the State's petition should be denied.

STATEMENT OF FACTS

Nuclear power is one of the major sources of energy in the nation, but it unavoidably generates radioactive wastes along with the energy it produces. One of the most crucial issues for the nation's nuclear power industry is the ability to store and ultimately to dispose of radioactive waste in a manner consistent with the public health and safety. In a nuclear power reactor, the uranium fuel is contained in fuel rods located in the reactor core. After about three years of use, these fuel rods become "spent" as accumulated radioactive fission products reduce their ability to sustain nuclear reactions. The rods must then be replaced to enable the reactor to operate efficiently.[1]

After the spent fuel rods are removed from the reactor, they are temporarily stored in water-filled basins ("spent fuel pools") adjacent to the reactor.[2] The eventual disposition of spent fuel will be either permanent disposal or

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[1] For recent discussions of spent fuel storage and disposal, see *Township of Lower Alloways Creek v. Public Service Electric & Gas Co.*, 687 F.2d 732, 735-36 (3d Cir. 1982); *Potomac Alliance v. NRC*, 682 F.2d 1030, 1032-34 (D.C. Cir. 1982) (Bazelon, J., concurring).

[2] Currently, utilities are storing more than 27,000 spent fuel assemblies in their spent fuel pools. DOE, *Spent Fuel Storage Requirements*, DOE/RL-82-1, Table 10, at 23 (June 1982).

reprocessing.[3] However, commercial reprocessing is not now available and is unlikely to be available in the near future.[4] Nor is there today a permanent repository to which spent fuel can be sent, although the United States Department of Energy ("DOE") is carrying out a very substantial program to develop a permanent repository for spent fuel and reprocessing wastes.[5]

In the current absence of commercial reprocessing or a permanent storage repository, utilities must continue to

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[3] When spent fuel is reprocessed, the reusable uranium and plutonium remaining in the spent fuel are separated from the radioactive wastes. This uranium and plutonium may then be "recycled" into new reactor fuel assemblies. *See Westinghouse Electric Corp. v. NRC*, 598 F.2d 759, 762-65 (3d Cir. 1979).

[4] Although a commercial reprocessing facility at West Valley, New York, operated from 1966 to 1971, there are today no commercial reprocessing facilities in operation in the United States. The moratorium on commercial reprocessing imposed in 1977, 13 Weekly Comp. Pres. Doc. 506 (Apr. 7, 1977), has now been lifted. 17 Weekly Comp. Pres. Doc. 1101 (Oct. 8, 1981). However, it is unlikely that commercial reprocessing will be available for at least a decade.

[5] Prehearing Statement of DOE (Dec. 21, 1981), in Nuclear Regulatory Commission Docket No. PR-50, 51 (44 Fed. Reg. 61,372) *Proposed Rulemaking on the Storage and Disposal of Nuclear Waste*. DOE is spending hundreds of millions of dollars each year on this program. *See* H. Rep. No. 345, 97th Cong., 1st Sess. 26, 32 (Nov. 19, 1981) (FY 1982 appropriations totalling $217 million); Office of Management and Budget, *Budget of the United States Government, 1983*, at 5-43 ($350 million for commercial nuclear waste programs in FY 1983). DOE is already making preparations to sink exploratory shafts to allow underground investigation of permanent disposal sites. DOE, *Fiscal Year 1982 Congressional Budget Request, Energy Supply Research and Development*, DOE/CR-0011/3, at 123 (Feb. 1981). See pp. 16-18 *infra* for a discussion of the pending federal nuclear waste disposal legislation.

store their spent fuel on an interim basis. Typically, storage of this fuel has been in a spent fuel pool at the nuclear power plant. These pools were originally sized only for short-term storage, because it was assumed that the spent fuel would be regularly shipped off-site for reprocessing. However, currently operating reactors have dramatically increased the storage capacity of their pools by changing the racks in which the spent fuel is stored so that the fuel assemblies can be stored closer together.[6] Notwithstanding these efforts, many reactors will simply run out of on-site storage space by the mid- to late-1980's. By that time, structural limits on plant design will effectively prohibit further increases in the pools' storage capacities. By 1990, some 12-15 operating reactors will have exhausted their storage capacities.[7] At that point, the utilities will have to find somewhere else to store their spent fuel or shut down their reactors.

The replacement power and other costs of shutting down a nuclear power plant are astronomical, and utilities have a very limited range of options for storing the additional spent fuel that their reactors will discharge. Many studies have confirmed that AFR's will be needed for this purpose by the mid- to late-1980's.[8] There exist today

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[6] This method for increasing storage capacity is described in *Minnesota v. NRC*, 602 F.2d 412, 413-14 (D.C. Cir. 1979), and in *Township of Lower Alloways Creek, supra* n.1, at 736-37.

[7] NRC, *Quarterly Status Report on the Away-From-Reactor (AFR) Spent Fuel Storage Situation* 8 (Aug. 2, 1982).

[8] *See, e.g.*, NRC, *Final Generic Environmental Impact Statement on Handling and Storage of Light Water Power Reactor Fuel*, NUREG-0575, ES11-12 (Aug. 1979); DOE, *Spent Fuel Storage Requirements*, DOE/SR-0007 (Mar. 1981); NRC, *Quarterly Status Report on the Away-From-Reactor (AFR) Spent Fuel Storage Situation* (Aug. 2, 1982).

three AFR's in the United States. As the court of appeals noted, the General Electric spent fuel facility at Morris, Illinois is the only one which is presently accepting commercial spent fuel for storage. Appendix to Petition For Certiorari ("Pet. App.") at 2a. The other AFR's are at West Valley, New York, and at Barnwell, South Carolina. The West Valley AFR is now owned by the State of New York, and it is no longer accepting additional spent fuel, although some spent fuel is currently being stored there. The Barnwell facility is not licensed by the NRC and has never operated.

The Spent Fuel Act is a direct attack on the Morris facility and would prohibit its use as an important element of the nation's radioactive waste management efforts. The Act also would have set an unfortunate precedent that could have interfered with the development of permanent geologic repositories for spent fuel and high-level radioactive waste. There will be only a few permanent repositories, and the radioactive material will have to be shipped from one state to another. If the Spent Fuel Act is valid, any state could bar radioactive shipments from crossing its borders and could block the siting of a repository within its territory. Any such result would be a serious obstruction of the nation's nuclear waste disposal program.

SUMMARY OF ARGUMENT

The decision of the court below is a routine application of the supremacy and commerce clauses to a state statute that is plainly unconstitutional. The Illinois Spent Fuel Act is clearly preempted by the Atomic Energy Act, 42 U.S.C. § 2011 et seq., and it is also an impermissible obstruction of interstate commerce. The Seventh Circuit's holding to that effect is consistent with pertinent

decisions of this Court and other courts of appeals. The correct application of well-established constitutional principles by a lower court does not call for Supreme Court review.

The State's petition should also be denied because the bulk of the issues and arguments it raises were never urged in the court of appeals and never decided by that court. In particular, the State did not rely upon the tenth amendment or section 274(k) of the Atomic Energy Act, 42 U.S.C. § 2021(k), in the court below. In addition, the State's present characterization of the Spent Fuel Act as an economic measure designed to protect the State Treasury is new in this Court and totally inconsistent with the State's argument below that the Act was designed to protect public health by eliminating a source of radioactive air pollution. The Supreme Court should not consider issues that have not been argued or decided in the court below.

Finally, it would be inefficient and wasteful of scarce judicial resources to consider this case, because of the comprehensive nuclear waste disposal legislation that is currently pending before Congress. The legislation would substantially alter the statutory context in which this case arose. It would also eliminate the basis for the complaints in the State's petition about the alleged lack of a national waste disposal program. Supreme Court review is inappropriate when the factual and legal bases of the case are likely to be changed through intervening congressional action.

ARGUMENT

I. The Spent Fuel Act Is Preempted By The Atomic Energy Act

The district court held the Spent Fuel Act preempted by the Atomic Energy Act on the basis of an established

line of cases beginning with *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).[9] In the court of appeals, the State acknowledged "the general rule of federal preemption set forth in *Northern States Power Co. v. Minnesota* . . . ." State ct. app. brief at 61. The State's *only* argument to avoid preemption was that the Spent Fuel Act is a valid radioactive pollution control measure authorized by the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. *Id.* at 56-62. In this Court, the State has abandoned its Clean Air Act argument and now contends that preemption is avoided through section 274(k) of the Atomic Energy Act, 42 U.S.C. § 2021(k). Pet. at 6-13. This issue was not raised, argued or decided in the court of appeals, and therefore it should not be considered by this Court. *G.D. Searle & Co. v. Cohn*, 102 S. Ct. 1137, 1143 n.7 (1982); *United States v. Ortiz*, 422 U.S. 891, 898 (1975). Even if the State's argument were to be considered on the merits, it is insufficient to warrant Supreme Court review.

Section 274 of the Atomic Energy Act authorizes the NRC to turn over to the states limited regulatory author-

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[9] District Court's Memorandum Opinion and Order dated Oct. 12, 1981, at 5-6. Numerous cases have held that the Atomic Energy Act preempts state regulation of the radiological hazards of nuclear energy. *See, e.g., Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 15-17 (1976); *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982); *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 579-81 (7th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3173 (U.S. Sept. 2, 1982)(No. 82-386); *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908, 922-23 (10th Cir. 1981), *appeal filed*, 51 U.S.L.W. 3025 (U.S. May 20, 1982)(No. 81-2159); *United States v. City of New York*, 463 F. Supp. 604 (S.D.N.Y. 1978).

ity over byproduct material, source material and special nuclear material in quantities not sufficient to form a critical mass. The NRC may cede authority under this provision on a state-by-state basis pursuant to an agreement with the governor of the state. Illinois has never entered into such an agreement with the NRC, and section 274 therefore has no application here. *See Illinois v. Kerr-McGee Chemical Corp.*, *supra* n.9, at 580. Even if there were such an agreement between Illinois and the NRC, it still would not permit state regulation of spent nuclear fuel. Spent fuel contains sufficient quantities of special nuclear material (enriched uranium and plutonium) to form a critical mass[10] and is thus specifically excluded from the scope of section 27

In addition, section 274(c)(4) requires the NRC to retain authority and responsibility for regulation of the disposal of such special nuclear material as the NRC finds sufficiently hazardous to require an NRC license for disposal. The NRC has done so with respect to spent fuel and has promulgated comprehensive regulations governing the disposal of spent fuel. *See* 10 C.F.R. Part 60.[11] *See also* 10 C.F.R. §§ 20.301-.306

Notwithstanding the general inapplicability of section 274, the State insists that preemption is avoided by sub-

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[10] *See Township of Lower Alloways Creek*, *supra* n.1, at 737; 10 C.F.R. § 72.73 (design criteria to prevent criticality in spent fuel storage systems).

[11] In the Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233, Congress specifically charged the NRC with the responsibility of licensing and regulating permanent disposal repositories. 42 U.S.C. § 5842(3). In 1977 Congress gave DOE ultimate responsibility for establishing and operating disposal facilities, subject to the NRC's licensing and regulatory authority. 42 U.S.C. § 7133(a)(8).

section 274(k), which provides that "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." The State attempts to bring itself within this provision by arguing that the Spent Fuel Act was not intended to protect the public from radiation hazards, but rather is an economic measure designed to protect the State's fiscal resources. Pet. at 7-13. The State's theory is that General Electric will "abandon" the Morris facility when it is filled, and the State will have to take over and manage the facility, which is likely to "bankrupt" the State's treasury.[12] *Id.* at 7-8. Here too, the State is shifting its position. In the court below, the State did *not* argue that the Spent Fuel Act is an economic or fiscal measure. Rather, the State represented that the Act is "a state regulation of radioactive air pollution" designed to protect "the health and safety of the people of Illinois" from "cancer, birth defects, or other forms of radiation induced disease, injury or death." State ct. app. brief at 51-52, 57.[13] This radiolo-

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[12] This entirely speculative argument is inconsistent with the NRC's regulations requiring licensees to make elaborate provisions for decommissioning AFR's. 10 C.F.R. §§ 72.18, 72.31(a)(10), 72.38, 72.76.

[13] The State chastises the court of appeals for "ignoring" legislative history which is claimed to reflect the economic nature of the Spent Fuel Act. Pet. at 10. Yet the State cites no legislative history in its petition, and the history it cited in the court of appeals directly contradicts its assertion here. In that court, the State characterized the legislative history as showing that "[t]he General Assembly was also concerned that the very movement of waste into Illinois would endanger health." State ct. app. reply brief at 25. In support of this conclusion, the State relied upon remarks by Senators Joyce and DeMuzio during the debate leading to an override of Governor

gical focus of the Act brings it squarely within the area preempted by the Atomic Energy Act, and section 274(k), by its very terms, has no application. The State should not be heard to argue here for the first time that the Act is an economic measure.

The State's dramatic change in position is a transparent attempt to make this case look like *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*, 659 F.2d 903 (9th Cir. 1981), *cert. granted*, 102 S. Ct. 2956 (1982)(No. 81-1945). In that case, the Ninth Circuit sustained a California moratorium on new nuclear plants on the ground that it was really a "financial" measure rather than regulation of radiation safety. Thus the State believes that it has found a conflict in the circuits warranting Supreme Court review. Pet. at 11. The Public Utilities believe that *Pacific Legal Foundation* was wrongly decided and should be reversed. That does not mean, however, that there is a conflict in the circuits or that this case should be reviewed. The Ninth Circuit's most recent decision in this area is *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), which is on all fours with the present case. There, the State of Washington passed an initiative prohibiting storage within Washington of low-level nuclear waste generated outside the state. The court held the initiative preempted by the Atomic Energy Act, notwithstanding

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Thompson's veto of the Spent Fuel Act. Both remarks demonstrate a concern for radiological safety, not economics. For example, Senator DeMuzio urged an override because he did not think "the citizens of this State [should] be subjected to the risk of radiation that's been generated in other states . . . ." Transcript of Senate debate, Dec. 3, 1980, at 50.

section 274 of the Act. 684 F.2d at 630. The present case is wholly consistent with *Washington State* and with the vast bulk of the other cases in this area of preemption jurisprudence. *Pacific Legal Foundation* is the only aberration; only *Pacific Legal Foundation* need be reviewed and reversed by this Court.

Finally, even if the Spent Fuel Act were ostensibly a fiscal measure and even if section 274(k) had been argued below, preemption still would be the inevitable result. Section 274(k) was never intended to permit wholesale state prohibitions on the use of federally licensed nuclear facilities. It was designed simply to leave room for state laws "dealing with matters on the fringe of the preempted area in the light of all the provisions and purposes of the Atomic Energy Act . . . ." *Federal-State Relationships in the Atomic Energy Field: Hearings Before the Joint Committee on Atomic Energy*, 86th Cong., 1st Sess. 500 (1959). It can hardly be regarded as on the "fringe" of the preempted area to prohibit storing out-of-state spent nuclear fuel at an AFR licensed by the NRC for that purpose. In fact, the NRC has promulgated comprehensive regulations covering the design, siting, licensing and operation of spent fuel AFR's. 10 C.F.R. Part 72. The regulations specifically preclude state regulation of AFR's, even in section 274 agreement states. 10 C.F.R. §§ 72.8, 150.15(a)(7). The pervasive federal regulation of spent fuel and AFR's preempts state regulation in this area, and it clearly precludes the State's attempt to prohibit entirely the storage of all out-of-state spent fuel at the Morris AFR.

The Spent Fuel Act strikes at the very heart of the federal regulatory program, and it directly conflicts with the congressional determination to promote the development and use of atomic energy for peaceful purposes. *See* 42 U.S.C. §§ 2011, 2012(a), 2013(a), 2013(d). If the Spent

Fuel Act is valid, then any state could interfere with any aspect of the federal atomic energy program—even to the point of prohibiting new reactors and shutting down operating reactors—by the simple expedient of labeling its laws "economic." This result is hardly authorized by section 274(k).

II. The Atomic Energy Act Does Not Violate The Tenth Amendment

The State contends that the Atomic Energy Act violates the tenth amendment insofar as the Act prevents Illinois from excluding out-of-state spent fuel from the Morris facility. Pet. at 11-13.[14] This is so, according to the State, because the failure to enact a national waste disposal program makes Illinois the "dumping ground" for the nation's nuclear wastes and thereby deprives the State of "the right to protect its treasury" and holds the State's taxpayers "at ransom." Pet. at 11, 12. Once again, this is an argument that was not raised or decided in the court below and therefore should not be considered here. In any event, the argument is wholly without merit.

The leading case in this area is *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S. Ct. 2352 (1981). There, the Court stated that congressional legislation cannot be held invalid under the tenth amendment unless three requirements are satisfied: (1) the federal statute must regulate "States as States;" (2) it must address matters and that are indisputably "attributes of state sovereignty;" and (3) it must directly impair the states'

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[14] As discussed in the next section of this brief, the commerce clause independently prohibits the State's exclusion of out-of-state spent fuel. It is difficult to see how the tenth amendment can be offended by a result that is *commanded* by the commerce clause.

ability "to structure integral operations in areas of traditional functions." 101 S. Ct. at 2366. None of these requirements is satisfied here.

First, in the context of this case the Atomic Energy Act does not regulate "States as States," but rather the private nuclear power industry. Nothing in the tenth amendment "shields the states from pre-emptive federal regulation of *private* activities affecting interstate commerce." 101 S. Ct. at 2367 (emphasis in original). Second, it can hardly be argued that the right to exclude out-of-state spent fuel from a private AFR is an indisputable attribute of state sovereignty. Third, the Atomic Energy Act does not impair the State's ability to operate its treasury or any other traditional state function. The State's imaginative arguments about being held "at ransom" do not satisfy the third requirement, since the determinative factor is "the nature of the federal action, not the ultimate economic impact on the States." 101 S. Ct. at 2368 n.33; *accord, FERC v. Mississippi*, 102 S. Ct. 2126, 2143 n.33 (1982).

The Atomic Energy Act simply does not intrude upon the inherent sovereignty of Illinois or impair its functioning as a State. The Act therefore does not violate the tenth amendment.[15]

III. The Spent Fuel Act Violates The Commerce Clause

The court of appeals correctly held that the Spent Fuel Act violates the commerce clause by overtly discriminat-

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[15] We are aware of only one case in which the Atomic Energy Act was challenged under the tenth amendment, and the challenge there was summarily rejected. *Simmons v. Arkansas Power & Light Co.*, 655 F.2d 131, 135 (8th Cir. 1981).

ing against out-of-state spent fuel. The controlling precedent is *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), in which this Court relied upon the commerce clause to strike down a New Jersey statute barring importation of solid and liquid waste originating outside New Jersey. The State attempts to avoid *City of Philadelphia* by arguing that the Spent Fuel Act is a valid "quarantine" measure designed to prevent commerce in "noxious articles" that are "inherently dangerous" and "could easily result in the leakage of lethal and environmentally destructive radioactive material." Pet. at 14, 15.[16] This Court rejected the same "quarantine" argument in *City of Philadelphia*, holding:

> But those quarantine laws banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. *Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.*

437 U.S. at 628-29 (emphasis added).

The quarantine exception obviously has no application here. The Spent Fuel Act does not prohibit all traffic in spent fuel regardless of its origin. To the contrary, the Act excludes only out-of-state spent fuel; it has no effect on spent fuel generated within the State, nor does it

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[16] This characterization of the Spent Fuel Act is, of course, completely inconsistent with the State's argument for preemption purposes that the Act is a purely economic measure not aimed at regulating radiological hazards. Like Janus, the State has no difficulty looking in opposite directions at the same time. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 540 n.15 (1978).

prohibit transportation of spent fuel *through* Illinois to a destination in another state. If the Spent Fuel Act were a true quarantine measure, it would ban all storage, disposal and other traffic in spent fuel regardless of the source of the spent fuel. The Act does not do so, and it is therefore clearly unconstitutional.

The decision of the court below is a routine application of *City of Philadelphia* and the commerce clause.[17] Supreme Court review is hardly warranted. Indeed, the Spent Fuel Act is precisely the kind of parochial state protectionism that the commerce clause was intended to prevent.

IV. Supreme Court Review Is Inappropriate Because Of Pending Federal Legislation

There is currently pending before Congress comprehensive nuclear waste management legislation that would substantially alter the statutory context in which this case arose and would eliminate the basis for the State's repeated complaints about the alleged absence of a national waste disposal program. *See* Pet. at 4, 6, 7, 8, 11, 12, 13. Because of the changing statutory circumstances, a Supreme Court decision in this case may have little lasting significance or broad application. Accordingly, it would be a waste of scarce judicial resources to hear and decide this case.

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[17] The Ninth Circuit has recently applied the commerce clause in the same way to strike down a Washington State initiative barring importation of out-of-state low-level radioactive waste. *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627, 630-32 (9th Cir. 1982).

In the Senate, the National Nuclear Waste Policy Act of 1982 (S. 1662) was passed by a vote of 69-9 on April 29, 1982. 128 Cong. Rec. S4325-36 (daily ed. April 29, 1982). The corresponding House bill (H.R. 7187) came to the House floor on September 30, 1982, where general debate was completed and all permissible amendments were offered. 128 Cong. Rec. H8161-99 (daily ed. Sept. 30, 1982). Thereafter, Congress adjourned until the beginning of its "lame duck" session on November 29, 1982. *See* 128 Cong. Rec. S13,410 (daily ed. Oct. 1, 1982). It is expected that the House will take up H.R. 7187 shortly after it reconvenes.[18] Differences between the House and Senate bills will have to be resolved, and the legislation will be sent to the President for signature. The nuclear waste legislation is a high-priority item for both Congress and the Administration, and we expect that every effort will be made to ensure that it becomes law before the end of the current session of Congress.

Although the House and Senate bills differ somewhat, the general approach is the same. The legislation declares that it is the responsibility of the federal government to provide repositories for the permanent disposal of spent fuel and other high-level nuclear waste, and to assure that adequate interim storage capacity will be available until the permanent repositories can be put in service.[19] To this

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[18] The House leadership has made a firm commitment to take up H.R. 7187 during the first week of the lame duck session. Letter dated Oct. 13, 1982, from Chairman Udall of the House Committee on Interior and Insular Affairs to Representative Broyhill of the House Committee on Energy and Commerce.

[19] *See* S. 1662, §§ 101, 102, 301, *reprinted in* 128 Cong. Rec. S4325-27 (daily ed. April 29, 1982); H.R. 7187, § 131, *reprinted in* 128 Cong. Rec. H8187 (daily ed. Sept. 30, 1982).

end, the legislation directs DOE to carry out a program of research, development, site selection and construction with the aim of having permanent repositories in operation within the next fifteen years.[20] In addition, provisions are made to facilitate and encourage on-site interim storage of spent fuel and to authorize DOE to make available off-site AFR storage facilities.[21]

Thus the pending waste management legislation will dramatically affect the subject matter of the State's petition and will eliminate any possible basis for concern about the supposed lack of a comprehensive national program to deal with spent fuel storage and disposal. Under these circumstances, Supreme Court review of this case is unwarranted.

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[20] *See* S. 1662, §§ 401-11, *reprinted in* 128 Cong. Rec. S4329-32 (daily ed. April 29, 1982); H.R. 7187, §§ 211-21, *reprinted in* 128 Cong. Rec. H8191-94 (daily ed. Sept. 30, 1982).

[21] *See* S. 1662, §§ 301-14, *reprinted in* 128 Cong. Rec. S4326-29 (daily ed. April 29, 1982); H.R. 7187, §§ 131-37, *reprinted in* 128 Cong. Rec. H8187-90 (daily ed. Sept. 30, 1982).

CONCLUSION

The Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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